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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

INTERCOLLEGIATE (BIG TEN) CONFERENCE OF FACULTY REPRESENTATIVES, INDIANA UNIVERSITY, UNIVERSITY OF IOWA, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, UNIVERSITY OF MINNESOTA, NORTHWESTERN UNIVERSITY, OHIO STATE UNIVERSITY, PURDUE UNIVERSITY and UNIVERSITY OF WISCONSIN,

Petitioners,

vs.

DAVID C. WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 1, 1982

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by conditioning removal jurisdiction on policy considerations, not jurisdictional in nature, such as whether removal promoted judicial economy, gave defendant an "unearned" advantage, and involved an undue instrusion upon the state courts.

2. Whether the Court of Appeals erred in assuming that federal jurisdiction existed over an original complaint which had alleged no basis for federal question or diversity jurisdiction.

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Petitioners,

VS.

DAVID C. WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Intercollegiate (Big Ten) Conference of Faculty Representatives ("Conference"),[1] respectfully prays

[1]This petition is filed on behalf of the Conference, a voluntary unincorporated association, and nine of its ten member universities. The nine petitioning member universities are Indiana University, University of Michigan, Michigan State University Purdue University, University of Wisconsin, University of Iowa,

that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 26, 1982.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred by conditioning removal jurisdiction on policy considerations, not jurisdictonal in nature, such as whether removal promoted judicial economy, gave defendant an "unearned" advantage, and involved an undue intrusion upon the state courts.

2. Whether the Court of Appeals erred in assuming that federal jurisdiction existed over an original complaint which had alleged no basis for federal question or diversity jurisdiction.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 668 F.2d 962. The opinion of the United States District Court for the Central District of Illinois is reported at 513 F.Supp. 1062.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 26, 1982. A timely petition for rehearing was denied on March 4, 1982. This petition is being timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES CONSTRUED

28 U.S.C. § 1441(a), (b) (1976)

Northwestern University, Ohio State University and University of Minnesota. The tenth member, the University of Illinois, and Neale Stoner and the University of Illinois Athletic Association are also parties to this case and are represented by other counsel.

28 U.S.C. § 1446(b) (1976)

28 U.S.C. § 1447(c) (1976)

The text of these Statutes appears at A-53.

STATEMENT OF THE CASE

The issues presented in this petition concern the right of a defendant to remove a case to federal court. While removal issues are to be solely determined by reference to the plaintiff's complaint, the Court of Appeals in this case has developed a novel test for when removal jurisdiction exists which goes beyond a review of the complaint. Therefore, a summary of events which are not reflected in the plaintiff's complaint is required.

Plaintiff David C. Wilson is a professional football player whose approximately one year enrollment at the University of Illinois en route to the National Football League gave rise to this lawsuit. Before the plaintiff enrolled at the University of Illinois, he played football for and attended some classes at a junior college in California. As a result of a lack of academic progress at the junior college, he was not eligible to play football for the University of Illinois under the academic rules of the Conference of which the University of Illinois is a member.

After enrolling at the University of Illinois, the plaintiff sought a waiver of the Conference eligibility rules so that he could play football during the 1980 and 1981 seasons. He did not obtain the waiver.

Shortly before the 1980 football season began, the plaintiff filed a two count Complaint for Declaratory Judgment and Injunctive Relief in the Circuit Court of Champaign County, Illinois. (A-18). The first count of that complaint alleged that the defendants Neale Stoner, the Athletic Director of the University of Illinois Athletic Association, and the National Collegiate Athletic Association ("NCAA") had deprived him of his rights under the Constitution of the

State of Illinois and the United States Constitution to due process and equal protection by implementing a rule which limited his eligibility for football at the University of Illinois to one season. He sought as relief a declaratory judgment and injunctive relief to play during the 1980 season; he did not pray for money damages. (A-26). The Conference was not named as a party in Count I of this original complaint.

The second count of his complaint alleged that the Conference and its member universities unconstitutionally deprived him of his right to play football. The crux of his complaint was that the Conference's procedure for handling his waiver application was unconstitutionally vague, did not have a proper fact-finding procedure, and involved an undue delegation of authority to its faculty representatives. The plaintiff did not identify in this second count either the constitution or the constitutional provision which the Conference allegedly violated. He sought as relief both injunctive relief as to the 1980 season and an unspecified amount of damages "if appropriate." (A-36).

A preliminary injunction hearing was held in state court on August 27, 1980, and on September 5, 1980 the state court preliminarily enjoined the defendants from interfering with the plaintiff's football career during the fall of 1980. During the preliminary injunction hearing, the defendants Stoner, University of Illinois, and University of Illinois Athletic Association ("Illinois Defendants") supported the plaintiff's request for an injunction. However, the Conference's motion to realign the Illinois Defendants as plaintiffs because of their community of interest with the plaintiff was denied. The Illinois Defendants also refused to join the Conference in an attempt to remove the original complaint to federal court.

After the preliminary injunction was entered, the Conference learned that false information had accompanied the plaintiff's waiver application. In light of this discovery, the state trial court dissolved its own preliminary injunction on September 17, 1980.

On September 18, 1980, the Illinois Appellate Court summoned the parties to appear before it on the next day to argue the merits of the dissolution of the preliminary injunction, even though the plaintiff had not filed a notice of appeal. On September 19, 1980, without the aid of either the trial court record or briefs, the appellate court reinstated the preliminary injunction. The appellate court further ordered that its mandate should issue immediately and informed the Conference that no petition for rehearing would be considered.

The Conference then requested the Illinois Supreme Court to recall the appellate court's mandate because of the irregularities in the appellate court proceeding. The Illinois Supreme Court declined to recall the mandate by a 4-3 vote.

On March 25, 1980, the plaintiff amended his complaint to add new counts which charged that the Conference and nine of its member universities had:

> (a) Deprived him of due process and equal protection under color of state law under the Fourteenth Amendment of the United States Constitution (A-36, Count III ¶ 8);
>
> (b) Deprived him of his rights to travel under the First Amendment of the United States Constitution (A-38, Count III ¶ 17);
>
> (c) Deprived him of his rights to associate under the First Amendment of the United States Constitution (A-38, Count III ¶ 17);
>
> (d) Deprived him of his rights to study under the First Amendment of the United States Constitution (A-38, Count III ¶ 17);
>
> (e) Deprived him of his civil rights under Article IV of the United States Constitution (A-37 to 38, Count III ¶ 16);
>
> (f) Deprived him of his civil rights protected under the Federal Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983 and 1985 (1976) (A-40, Count III ¶ 28);

(g) Violated the Illinois Antitrust Act, Ill.Rev.Stat. ch. 38, § 60 (A-41 to 42, Count IV ¶ 28); and

(h) Discriminated against him because of his sex in violation of Title IX, 20 U.S.C. §§ 1681-1683 (A-44, Count V ¶ 30).

None of the claims appeared in the original complaint. As relief for these new charges, the plaintiff sought $9,000,000 as compensatory damages and $27,000,000 as punitive damages.

Following the filing of the new claims, the plaintiff stipulated to the dismissal of the NCAA. The damage claims against the University of Illinois were dismissed. The Conference then timely removed the case to federal district court on April 8, 1981.

The plaintiff's motion to remand was denied by the district court. The Conference filed a motion for summary judgment as to all the plaintiff's claims and the district court granted that motion on June 29, 1981. The plaintiff appealed from both the denial of his motion to remand and the entry of summary judgment.

On January 26, 1982, the Court of Appeals ruled that the district court should have granted the plaintiff's motion to remand because there was no jurisdiction for removal. The Court of Appeals conceded that it "might agree" that the case was properly removable "[i]f the only interests at stake ... were the private interests of the parties," but nevertheless held that removal was improper because of "policy concerns, jurisdictional in nature and hence not waivable...." (A-10 to 11) The policy concerns controlling removal jurisdiction which were identified by the Court of Appeals included judicial economy, fairness to the parties, the motives of the plaintiff and defendants, and the deference to be accorded by federal courts to state courts.

The Conference's petition for a rehearing was denied on March 4, 1982.

REASONS FOR GRANTING THE PETITION

I. IN DETERMINING WHETHER REMOVAL JURISDICTION EXISTED, THE COURT OF APPEALS TOOK INTO ACCOUNT DISCRETIONARY FACTORS DIRECTLY CONTRARY TO THE DECISIONS OF THIS COURT AND OF LOWER FEDERAL COURTS.

Section 1447(c) of the Judicial Code, 28 U.S.C. § 1447(c) (1976), provides that a removed case may be remanded to state court only if the district court determined that it was removed "improvidently and without jurisdiction." The district court to which this action was removed rejected the plaintiff's motion to remand, finding that the requisites of 28 U.S.C. §§ 1441 and 1446 (1976) had been met.[2] The Court of Appeals reversed that order on the basis that the district court had failed to assess certain "policy concerns, jurisdictional in nature and hence not waivable" by the plaintiff, despite the fact that these concerns were discretionary, not jurisdictional, and had never been raised by either party, by the district court, or by any other federal court in a removal case.

The Court of Appeals conditioned removal jurisdiction upon whether (1) its perceived purposes for the 30 day rule in 28 U.S.C. § 1446(b) ((a) to promote judicial economy, and (b) to deprive a defendant of an "unearned" advantage) would no longer be served; (2) the new federal claims were more "weighty" than those originally advanced; (3) the original claim was abandoned; (4) plaintiff either intentionally

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[2] Without explanation, the Court of Appeals never addressed the district court's decision that removal was proper pursuant to 28 U.S.C. § 1441(c) (1976). Instead, it dealt only with whether removal jurisdiction existed under 28 U.S.C. § 1446(b) (1976). The Conference had advanced both grounds both in the district court and the Court of Appeals. Moreover, the tests which each of the two sections presents are dissimilar so that resolution that removal jurisdiction did not exist under one section would not preclude removal jurisdiction being found to exist under the other.

withheld the filing of, or only after discovery learned of, federal claims until after the 30 day period had run; and (5) removal would unduly intrude upon the state courts.

The Court of Appeals' opinion allowing removal jurisdiction to depend on "policy concerns" conflicts with the Court's holding in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). Moreover, the Court of Appeals' conclusion that such policy concerns are "jurisdictional in nature" is in conflict with opinions of this and lower federal courts and provides a test for removal jurisdiction which is awkward and quite vulnerable to uneven application.

A defendant is afforded the right to remove actions involving federal claims from state court to federal district court by 28 U.S.C. § 1441(b) (1976). The statutory right of removal may be waived if it is not timely exercised. However, where the right of removal has initially been waived, federal courts have consistently held that the right of removal is revived if an amendment to the complaint adds a new and entirely different claim. The principle of revival originated in the Court's decision in *Fletcher* v. *Hamlet*, 116 U.S. 408 (1886). It has been consistently applied by numerous circuit and district courts. *Henderson* v. *Midwest Refining Co.*, 43 F.2d 23 (10th Cir. 1930); *Cliett* v. *Scott*, 233 F.2d 269, 271 (5th Cir.), *cert. denied*, 352 U.S. 917 (1956); *Craig Food Industries, Inc.* v. *Taco Time International, Inc.*, 469 F. Supp. 516 (D.Utah 1979); *Dow Corning Corp.* v. *Schpak*, 65 F.R.D. 72 (N.D.Ill. 1974).

In *Henderson* v. *Midwest Refining Co.*, 43 F.2d 23 (10th Cir. 1930), the right to remove was found to have been revived where a new cause of action was raised even though the facts in the first cause were the same as those advanced in the second. The Tenth Circuit cited the Seventh Circuit's decision in *Galesburg & Kewanee Elec. Ry. Co.* v. *Hart*, 221 F.7, 12 (7th Cir. 1915), as follows:

> " 'Departures occur either where the pleader deserts, in point of fact, the ground that he had first taken, or

> where he puts the same facts on a new ground in point of law'; and this is so although both pleadings may be based on the same transaction." 43 F.2d at 25.

Accordingly, the test as to when a right to remove is revived turns on whether a substantially new cause of action has been added to the complaint, even if it is based on the same set of facts upon which the original claim was based and even if the essential relief sought in the original claim is no different than that sought in the second cause.

The rationale for the revival doctrine is set forth in *Cliett* v. *Scott:*

> "[T]he authorities are overwhelming that, though a defendant has submitted himself to state court jurisdiction on one cause of action, this does not prevent his removing the cause when an entirely new and different cause of action is filed." 233 F.2d at 271.

Accord, Dow Corning Corp. v. *Schpak,* 65 F.R.D. 72, 75 (N.D. Ill. 1974).

In the context of federal question jurisdiction, the revival doctrine promotes principles of federalism that require federal courts to "bear the responsibility of deciding all questions of Federal law." 1980 U.S. Code Cong. & Ad. News 5063.

Except for the elements of whether the new cause is substantially different from the cause originally advanced, the test as to whether the revival doctrine applies is identical to the test used to determine whether a case is removable in the first instance under 28 U.S.C. § 1441(c) or § 1446(b) (1976). *See, e.g., Hearst Corp.* v. *Shopping Center Network, Inc.,* 307 F. Supp. 551 (S.D.N.Y. 1969). Federal courts have uniformly held that removal jurisdiction is to be determined solely by reference to the plaintiff's voluntary actions. *Great Northern Ry. Co.* v. *Alexander,* 246 U.S. 276 (1918); *Powers* v. *Chesapeake & Ohio Ry. Co.,* 169 U.S. 92 (1898). The existence of removal jurisdiction must appear in the well-pleaded allegations of the plaintiff's complaint, not by reference to the pleadings filed by the defendant or to the evidence. *Louis-*

ville & Nashville Ry. Co. v. *Mottley*, 211 U.S. 149 (1908). Concern over matters extrinsic to the pleadings, such as docket congestion or the delay of trial, are "plainly irrelevant" to removal jurisdiction. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976). As stated by the court in *Great Northern Ry. Co.* v. *Alexander, supra*, 246 U.S. at 281-82:

> "It is also settled that a case, arising under the laws of the United States, non-removable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant. *Kansas City & c. Ry. Co.* v. *Herman*, 187 U.S. 63; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U.S. 206; *Lathrop, Shea & Henwood Co.* v. *Interior Construction Co.*, 215 U.S. 246; *American Car & Foundry Co.* v. *Kettlehake*, 236 U.S. 311.
>
> "The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion."

Accordingly, the Court and all lower federal courts which have addressed removal jurisdiction and the revival doctrine have concluded that the plaintiff's voluntary act of amending his complaint to add a substantially new cause, evident from his complaint only, revives the right to remove. Moreover, exercise of the right is not to be thwarted by "policy considerations."

The Conference's Petition for Removal was based on the Amended Complaint, the pleading that provided the Conference with its first viable opportunity for removal. The March 25, 1981 amendment raised several federal claims, all new to the case and all substantially different from those claims originally advanced. These new claims were brought under the First Amendment, Fourteenth Amendment, and Article IV of the United States Constitution; Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq.* (1976); and three sections of the Federal Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983 and 1985 (1976); they sought declaratory relief that plaintiff was entitled to play football in 1981; and they claimed compensatory and punitive damages in the amount of $36,000,000. In contrast, the original claim against the Conference, found in Count II of the original Complaint, sought only declaratory and injunctive relief as to whether plaintiff could play football in 1980 and contained no reference whatsoever to the laws or Constitution of the United States. Plaintiff's voluntary amendment to his Complaint raising these new federal claims waived any right he had to rely on the 30 day rule in paragraph 1 of 28 U.S.C. § 1446(b) (1976), and the Conference's right to remove was thereby revived. *Cliett* v. *Scott*, 233 F.2d 269 (5th Cir.), *cert. denied*, 352 U.S. 917 (1956).

The Court of Appeals agreed that removal of the Amended Complaint, if considered without reference to its new test, would be removable, stating: "If the only interests at stake in this litigation were the private interests of the parties, we might agree with the district judge that the case was properly removed to Federal Court." (A-10). However,

instead of limiting its focus to the new federal claims voluntarily added to the Complaint, as was required by the Court's holdings in *Thermtron, Great Northern Ry. Co.*, and *Powers*, the Court of Appeals took into account (1) whether its perceived purposes for the 30 day rule, (a) judicial economy and (b) depriving defendant of an "unearned" tactical advantage, would be served; (2) plaintiff's motives for delaying the filing of the amendment or defendant's tactics in not initially removing; (3) whether the original claim was abandoned; (4) whether the original claim was more or less weighty than the new claims; and (5) whether removal would intrude unduly upon state courts, thereby offending the Court of Appeals' version of federalism.

This analysis is awkward, in conflict with the Court's holdings and those of lower federal courts, and poses substantial risks of uneven application of the removal statutes giving district judges license to use discretionary concerns to determine the existence of removal jurisdiction. We address below each of the Court of Appeals' positions.

A. Policy Concerns May Not Influence Removal Jurisdiction.

The Court of Appeals' ruling allowing policy concerns to influence whether removal jurisdiction exists contradicts the Court's holding in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). There, a district court remanded an action because of docket congestion. The Sixth Circuit denied defendant's Petition for Mandamus to review the remand order. This Court reversed, holding that discretionary issues such as a comparison of the dockets of the state and federal courts could not be taken into account in determining whether a case had been removed "without jurisdiction" under 28 U.S.C. § 1447(c) (1976). The "general considerations" described by the Court of Appeals as jurisdictional are precisely the type of issues this Court held in *Thermtron* could not be termed jurisdictional.

The best articulation of the disarray that will result from raising discretionary factors to jurisdictional status comes from the Seventh Circuit itself in *Ryan* v. *State Board of Elections*, 661 F.2d 1130 (7th Cir. 1981). There, a complaint was removed to the district court, which granted a motion to remand based on the doctrine of abstention. The Seventh Circuit reversed and held that the district court could not remand unless it was without jurisdiction or if removal had been improvident. The Court noted that the term "improvidently" in § 1447(c) refers to instances where statutory, nonjurisdictional requirements for removal have not been satisfied, and it held:

> "Abstention is a judicially-created doctrine; its application is discretionary. Under *Thermtron* a federal court with jurisdiction over a removed case may not remand it on discretionary grounds. Congress never intended 'to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.' *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 351, 96 S.Ct. 584, 593, 46 L.Ed.2d 542 (1976)." 661 F.2d at 1134.

To allow federal courts to take into account policy concerns, such as those chosen by the Court of Appeals, in determining whether federal removal jurisdiction exists converts jurisdiction into a matter of discretion and promotes uneven application of the federal laws. Whether jurisdiction exists should not involve guesswork. The Court's holding in *Thermtron* and 28 U.S.C. § 1447(c) (1976) require an analysis of removal jurisdiction free of discretionary principles or policies. Courts which have dealt with the revival doctrine have consistently applied it within the confines of the holding in *Thermtron*. There is no need to promote a new and, in fact, unworkable test for revival.

B. Whether the Purposes Behind the 30 Day Rule in 28 U.S.C. § 1446(b) ¶ 1 (1976) Are Satisfied is Immaterial to Removal Jurisdiction

Removal is never conditioned upon defendant's satisfying the Court of Appeals' perceived purposes behind the 30 day rule. Those purposes, the Court of Appeals believed, were (1) to prevent the waste of resources which results when a federal court duplicates or ignores a state court's actions, and (2) to deprive a defendant of an "unearned" tactical advantage of delaying beyond 30 days his decision to remove to see how he will fare in state court. Whether or not these are the reasons for the 30 day rule, they should have no influence on removal jurisdiction.

Removal is governed solely by reference to the plaintiff's well-pleaded allegations. *Louisville & Nashville Ry. Co.* v. *Mottley,* 211 U.S. 149 (1908). Revival is governed, at least in the context of federal question jurisdiction, solely by whether a new federal claim is advanced which was not part of the original case and which substantially changes the case. *Henderson* v. *Midwest Refining Co.,* 43 F.2d 23 (10th Cir. 1930); *Craig Food Industries, Inc.* v. *Taco Time International, Inc.,* 469 F. Supp. 516 (D.C.Utah 1979). So long as this test is met, the right to remove is revived. Whether the district court will be involved in duplicating or undoing preliminary actions of the state court is irrelevant to the issue of whether removal jurisdiction exists. In fact, 28 U.S.C. § 1450 (1976) contemplates that any injunction, order or other proceeding by a state court in a removed action "may be dismissed or modified by the district court."

Moreover, other federal courts which have addressed the question of revival have not been concerned with the progress of the state court action which was interrupted by removal. For example, in *Henderson* v. *Midwest Refining Co.,* 43 F.2d 23 (10th Cir. 1930), the defendant removed only after the plaintiff's first complaint had been dismissed. The Tenth Circuit Court of Appeals did not regard either the dismissal or the fact that the state court had made a substan-

tive ruling as relevant to whether removal jurisdiction existed. Similarly, in *Cliett* v. *Scott*, 233 F.2d 269 (5th Cir. 1956), *cert. denied*, 352 U.S. 917 (1956), ten years elapsed between the filing of the complaint and the filing of the amendment which revived the defendant's right to remove. Yet that court did not find jurisdiction affected by the activity in state court.

Furthermore, other federal courts to which state court actions were removed have accepted jurisdiction even after preliminary decisions were reached in state court and have even undone those state court decisions. See *Daniels* v. *McKay Machine Co.*, 607 F.2d 771 (7th Cir. 1979); *Quinn* v. *Aetna Life & Casualty Co.*, 616 F.2d 38 (2nd Cir. 1980); *Hill* v. *United States Fidelity & Guaranty Co.*, 428 F.2d 112 (5th Cir. 1970), *cert. denied*, 400 U.S. 1008 (1971); *FDIC* v. *First Mortgage Investors*, 485 F. Supp. 445 (E.D.Wis. 1980). Only under the Court of Appeals' approach has the amount of activity in state court ever been accorded jurisdictional significance.

The unsoundness of the Court of Appeals' judicial economy analysis is apparent when applied to an injunction case, such as this was initially. In a suit seeking injunctive relief, virtually all in-court activity occurs well within the first thirty days. Yet, so long as there is no final ruling on the merits, a defendant may remove to federal court, if the complaint is removable, on the thirtieth day, even if a preliminary injunction has been issued, regardless of his motives. 1A Moore's Federal Practice ¶ 0.157[9]; *Baker* v. *National Boulevard Bank*, 399 F. Supp. 1021, 1022 (N.D.Ill. 1975).

The Court of Appeals' concern that removal gives defendant an "unearned" tactical advantage is also irrelevant. Removal may or may not benefit a defendant. However, since only the plaintiff's voluntary pleading governs removal, whatever advantage defendant derives may not be regarded as undue. No court has ever conditioned removal on a measure of how deserving the defendant is of removal.

The revival doctrine, like paragraph 2 of 28 U.S.C. § 1446(b) (1976), which provides that an amendment to a complaint can render a case removable that was not removable originally, is an important exception to the 30 day rule. As an exception, it need not satisfy the purposes of that rule. The policy concerns which the Court of Appeals read into the 30 day rule are not relevant to determining the existence of removal jurisdiction.

Moreover, the 30 day rule is but a small and non-jurisdictional part of general removal statutes. 1A Moore's Federal Practice, ¶ 0.168[3.-5] at 490-91; *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 98 (1898); *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339 (1913); *Meyers-Arnold Co.* v. *Maryland Casualty Co.*, 248 F. Supp. 140, 146 (D.S.C. 1965). It may be waived by plaintiff without regard to whether the 30 day rule's purposes have further value. *See Haun* v. *Retail Credit Co.*, 420 F. Supp. 859, 863 (W.D. Pa. 1976). The Court of Appeals has concluded that the 30 day rule, and its purposes, are jurisdictional. However, as the Court stated in *Powers*:

> "But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel." 169 U.S. at 98 (citations omitted).

Satisfaction of the purposes of the 30 day rule is immaterial to federal removal jurisdiction.

C. The Parties' Motives Are Not Relevant to a Determination of Whether Removal Jurisdiction Exists.

The Court of Appeals' analysis as to whether removal jurisdiction exists is also infirm because it takes into account defendant's motives (whether a defendant originally waited to see how he would fare in state court) and plaintiff's motives (whether he intended to withhold his weighty claims or learned of them in discovery after the 30 day

period expired). Motives are immaterial to whether jurisdiction exists. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976); *Fugard* v. *Thierry*, 265 F. Supp. 743, 748 (N.D.Ill. 1967). The Court of Appeals suggested that the Conference acted improperly in attempting to remove the case. Not only is the speculation without basis, it is immaterial as well. As stated by the district court in *Minkoff* v. *Scranton Frocks*, 172 F. Supp. 870, 875-76 (S.D.N.Y. 1959):

> "I do not understand how a party can be guilty of 'bad faith' in exercising the statutory right of removal, in any event absent an agreement not to exercise that right."

Moreover, assessing motives is unworkable and vulnerable to error. For example, the Court of Appeals determined, without basis, that the Conference had taken a wait-and-see attitude in state court to determine how it would fare, and only after it found that things were not going well was removal sought. This speculation is in error. Within the first thirty days from the filing of the Complaint, the Conference was summoned to the Illinois Appellate Court by a telephone call from its clerk and three of its judges to appear before them the next day for a hearing on the propriety of the state trial court's dissolution of its preliminary injunction. No notice of appeal had then been filed. The court explained it had taken judicial notice from the "news media" of the proceedings below. On September 19, 1980, on the day of the hearing, within the thirty days from the filing of the Complaint, without the benefit of any briefs or a review of the record of proceedings before the state trial court, the Appellate Court reinstated the injunction. The Conference certainly knew before the removal period expired that it was not faring well in state court. It did not "choose" to stay in state court. It remained in the state court because the Complaint failed to state a federal claim and because the Conference's co-defendants, other than the NCAA, refused to consent to removal. If motives were relevant, under the Court of Appeals' theory plaintiff's tactics in failing to state

a federal claim at the outset and in naming friendly defendants who would not consent to removal favor denial of the motion to remand.

D. Revival of the Right to Remove Does Not Depend Upon Whether in Advancing New Claims, the Original Claim is Abandoned.

The Court of Appeals stated that whether a right to remove is revived turns, in part, on whether the original claim was abandoned. However, federal courts finding that a right to remove was revived have not required such abandonment. In *Henderson* v. *Midwest Refining Co.*, 43 F.2d 23 (10th Cir. 1930), the Court of Appeals held defendant's right to remove was revived even though there was no abandonment of the facts, theories or objective advanced in the first complaint. In *Henderson*, plaintiffs alleged that they had exclusive rights to certain oil leases for which they had filed applications with a Wyoming State board, but the board had given the leases to two other parties, assignors of the defendant. A demurrer to the complaint was sustained. An amendment was filed stating the same facts originally alleged and charging a conspiracy between the defendant, his assignors and the board to defraud plaintiffs. The case was removed to the district court which sustained a demurrer to the amended complaint. The Court of Appeals affirmed that the right to remove was revived by the filing of the amendment, even though both causes were based on the "same transaction" and both alleged fraud relating to the same properties, since the first cause was principally an action in equity (seeking an accounting plus damages) and the second sought damages only. There was no abandonment of the original facts, theories, target or objective. Yet the right to remove was revived.

In *Cliett* v. *Scott*, 233 F.2d 269 (5th Cir.), *cert. denied*, 352 U.S. 917 (1956), the right to remove was revived where the original complaint, seeking a money judgment regarding property, was amended ten years later to add an alternative theory for trespass to try title with respect to the same

property. In *Craig Food Industries, Inc.* v. *Taco Time International, Inc.*, 469 F. Supp. 516 (D.C. Utah 1979), the right to remove was revived where the original six-count complaint for declaratory judgment as to a license agreement to operate a fast-food franchise under the trademark "Taco Time" was amended twenty-one months later, adding a seventh count against the same defendant under the Lanham Act concerning the validity of the Taco Time trademark. In *Dow Corning Corp.* v. *Schpak*, 65 F.R.D. 72 (N.D.Ill. 1974), the right to remove was revived where the original complaint for a declaration of the validity of a covenant not to compete was amended five months later to add claims for breach of two separate contracts against the same defendant. In none of these cases was revival dependent on the plaintiff's abandonment of his original cause. The Court of Appeals' decision suggesting abandonment is a prerequisite to revival is in conflict with other Circuit Courts of Appeals.

E. The Merit or "Weightiness" of the New Claims is not Relevant to a Determination of Removal Jurisdiction.

The Court of Appeals determined that a defendant's right to remove depends upon what merit the federal court attaches to the new federal claims. This position conflicts with the Court's holding in *Great Northern Ry. Co.* v. *Alexander, supra*, that removal jurisdiction is not dependent upon an analysis of the merits of plaintiff's claims. At issue only is whether the claims are well-pleaded and, if so, whether they are substantially different from those advanced originally.

The Court of Appeals' comparative weightiness analysis is also infirm since it undercuts an important principle of federalism that federal courts should bear responsibility for dealing with federal claims since they are more familiar with them than state courts. The Court of Appeals went just far enough to conclude the federal claims were "make-

weights" but not far enough to affirm their dismissal.[3] Thus, the Court of Appeals is sending the federal claims back to the state court not for dismissal, but for the state court to be given an opportunity to second-guess the district court's and Court of Appeals' judgments that these claims are without merit. Yet, due to the relative inexperience state courts have with these types of federal claims, there is little assurance that a state court will view the federal claims in the same light that the two federal courts have. This potential for disparate treatment cuts at the heart of federalism which promotes uniform application of federal laws.

Moreover, were the state court to rule that the federal claims which the district court dismissed and the Court of Appeals termed "makeweights" were meritorious by misapplication of federal law, defendant would have no practical recourse. Furthermore, the misapplication of federal law by state courts is the very problem that federal question removal is intended to avoid.

The greatest problem with the Court of Appeals' weightiness theory is that it ignores reality. To suggest that an amendment which contains six federal claims and one state claim, all new to the case, and which seeks $36,000,000 in damages is less "weighty" than a two-count complaint for injunctive and declaratory relief regarding plaintiff's right to participate in a football season which had already passed by the time the amendment had been filed, taxes credulity. The facts that this amendment substantially changed the entire case and that the amendment revived the Conference's right to remove cannot be reasonably contested.

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[3]The Court of Appeals implied, erroneously, that the district court regarded the new federal claims to be of less merit than the original claim advanced. The district court drew no such distinction. It granted summary judgment on all claims.

F. Whether Removal Involves an Intrusion Upon the State Court is Immaterial to Federal Jurisdiction.

The Court of Appeals stated that in dealing with removal, district courts must display a "sensitivity to the danger of encroaching unduly on the authority of the state courts." (A-14). Yet this sensitivity is simply a substitute for the doctrine of abstention and as the Court of Appeals stated in *Ryan*:

> "Abstention is a judicially created doctrine; its application is discretionary. Under *T' rmtron* a federal court with jurisdiction over a remove . case may not remand it on discretionary grounds." 661 F.2d at 1134.

Moreover, the sensitivity to which the Court of Appeals refers stems from, in its analysis, the amount of time the case was pending in state court, the fact that the state court may have already entered a preliminary or non-final ruling and that there are state claims in which the state has an interest. These grounds are immaterial to jurisdiction.

First, neither the amount of time a case has been in state court nor even the entry of preliminary rulings in state court has any bearing on removal jurisdiction. *Daniels* v. *McKay Machine Co.*, 607 F.2d 771 (7th Cir. 1979); *Quinn* v. *Aetna Life & Casualty Co.*, 616 F.2d 38 (2nd Cir. 1980); *Hill* v. *United States Fidelity & Guaranty Co.*, 428 F.2d 112 (5th Cir. 1970), *cert. denied*, 400 U.S. 1008 (1971).

Second, the Court of Appeals acknowledged that the state court had only a "somewhat attenuated" interest in the case since every claim, even the state claims, depended on federal statutes and federal case law for their resolution.

The Court of Appeals agreed that at a minimum the federal claims might have been retained by the district court and that all of the state claims depended upon federal statutes and case law for their resolution. (A-14). However, while realizing the strong interests the federal court had in all of the claims, including the state causes of actions, and the "somewhat attenuated" interests the state court had, the

Court of Appeals concluded this contrast to be "iron[ic]" and "idiosyncratic." (A-14). This analysis is unsound. A more logical conclusion to be drawn from the fact that all of the claims require analysis of federal laws and federal cases is that the federal, not the state, court should have retained the case.

Furthermore, the Court of Appeals raised the issue of abstention in the context of federalism. However, its analysis represents a brand of "New Federalism" calling for state courts to hear federal claims.

In the legislative history of the Act which repealed the $10,000 requirement for federal question jurisdiction, it was stated:

> "[Repealing the $10,000 requirement] represents sound principles of federalism by mandating that the Federal courts should bear the responsibility of deciding all questions of Federal law. At the same time, it demonstrates an increased respect for the States by providing that Federal claims should not be forced on the overburdened state court system." 1980 U.S. Code Cong. & Ad. News 5063.

See also, American Law Institute, *Study of The Division of Jurisdiction Between the State and Federal Courts* 166-67 (1969); Currie, *The Federal Courts and the American Law Institute, Part II,* 36 U.Chi. L.Rev. 268 (1968); M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 53 (1980).

Third, the Court of Appeals' emphasis on avoiding undue intrusion upon the state court is based on what the Court of Appeals termed the state court's entry of "a preliminary adjudication on the merits." (A-15). However, the state court never made an adjudication on the merits, preliminary or otherwise. The Illinois Appellate Court did reinstate a preliminary injunction, within 48 hours following its dissolution by the state trial court, to allow plaintiff to play in a football game the next day and for the balance of the 1980

season. Yet the entry of a preliminary injunction does not constitute an adjudication on the merits. *Berrigan* v. *Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974). Moreover, the Illinois Appellate Court's decision, in view of the haste with which it had been reached and in view of that Court's complete disregard for appellate procedures, deserves no sensitivity from the federal court system.

The Court of Appeals' opinion is flawed because it turns federalism on its head by deferring to state courts federal claims and because it allows immaterial policy concerns to influence jurisdiction contrary to the Court's holding in *Thermtron*.

The Conference's right to remove under 28 U.S.C. §§ 1441(c) and 1446(b) (1976) most certainly revived upon the voluntary filing of the March 25, 1981 amendment. The district court's decision denying remand was sound. The test which the Court of Appeals used to review the district court's decision is unworkable and in conflict with holdings of this Court and lower federal courts.

II. THE COURT OF APPEALS PRESUMED THE EXISTENCE OF A FEDERAL CLAIM IN THE ORIGINAL COMPLAINT EVEN THOUGH SUCH A CLAIM WAS NOT ADVANCED.

The Court of Appeals' opinion states, without extensive discussion, that the original Complaint filed in this action was removable. (A-10). This conclusion is apparently based on the Court of Appeals' erroneous assumptions that the original Complaint asserted a claim against the Conference under both the Federal and Illinois Constitutions and that it sought both an injunction and damages. (A-9). In fact the original Complaint did not contain a federal claim alleging the requisite jurisdictional amount and could not have been removed.

The original Complaint contained two counts. Count I sought relief against the NCAA and other defendants. Count II sought relief against the Conference and other

defendants. (A-18 to 19, 26). Although both counts prayed for an injunction, neither claimed a specified dollar amount of damages; in fact, Count I stated that the injury it alleged was "not compensable by money damages" (A-24, Count I ¶ 24), and Count II sought damages only "if appropriate" (A-33). The state court had found the original Complaint failed to seek the type of monetary relief necessary for plaintiff's jury demand to be permissible under state practice. Furthermore, Count II, the only count against the Conference, and the only count with even a hint of a request for monetary relief, asserted only that plaintiff's "constitutional" rights had been violated, without specifying which constitution. Such an allegation is insufficient to demonstrate a federal source for plaintiff's claim. *Department of Mental Hygiene* v. *Kirchner,* 380 U.S. 194, 200 (1965); *Larsen* v. *Waddell,* 516 F. Supp 1353, 1355 (W.D.Pa. 1981); *Hearst Corp.* v. *Shopping Center Network, Inc.,* 307 F. Supp. 551, 556 (S.D.N.Y. 1969); 1A Moore's Federal Practice ¶ 0.168[3.–5] p. 484 n.32.

Professor Moore has stated:

> "A defendant should not be forced to speculate whether a suit is properly removable. As Judge Murrah suggests in Ardison v. Villa (Ca. 10th 1957) 248 F.2d 226, 227, . . . the underlying purpose of § 1446(b) is to permit the removal period to begin only after the defendant is able to ascertain intelligently that the requisites of removability are present." 1A Moore's Federal Practice, ¶ 0.168[3.–5] p. 484 n.32.

It was not until the Amended Complaint was filed that the plaintiff alleged a specific dollar figure for his new claims. The amendment asserted for the first time six discrete claims based on federal law, and each of them was for the first time assigned a dollar value.

Because the Court of Appeals had erroneously found the original Complaint removable, it then proceeded to what for it was the next logical step, a presumption that this right to

remove had been waived and an analysis of the Amended Complaint under the revival doctrine, which we have shown previously it misapplied. This entire misdirection of effort could have been avoided had the court correctly found that the original Complaint was not removable for the reason that it did not contain a federal claim and that the removability of the Amended Complaint was governed by 28 U.S.C. § 1446(b)¶ 2 (1976) rather than the revival rule.[4] Instead, to reach a result that restricts removal in one class of cases, the Court of Appeals has rendered an opinion that would greatly expand removal in a large class of cases by effectively abolishing the jurisdictional amount requirement.

The overwhelming weight of the decisions of this Court and Circuit Courts of Appeals has been that for removal jurisdiction to exist under § 1441(b), a well-pleaded complaint must contain all the prerequisites for a federal question claim, including the jurisdictional amount of $10,000.[5] This Court and every federal Court of Appeals but the Seventh

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[4]Diversity removal under 28 U.S.C. § 1441(a) (1976) was not available under the original Complaint due to the presence of Illinois citizen defendants and defendants whose connection with the sovereign rendered them "states" under Article III of the U.S. Constitution. 1A Moore's Federal Practice ¶ 0.161[1] pp. 197-98, 202-03. Removal under 28 U.S.C. § 1441(c) (1976) was also unavailable under the original Complaint because the claims asserted in Counts I and II arose out of a common nucleus of operative facts and were therefore pendent, rather than separate and independent (A-10). 1A Moore's Federal Practice ¶ 0.163[4.-5] pp. 270-71.

[5]This requirement was in effect in August of 1980, when the original Complaint was filed. It was not repealed until December 1, 1980, by P.L. 96-486, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (a)(Supp.IV 1981)). The repealing act, of course, did not of itself render the Complaint removable, since under the rule of voluntary action, it is only the plaintiff's act, and not that of the legislature, that can render a non-removable complaint removable. *Martropico Compania Naveria S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamania)*, 428 F. Supp. 1035 (E.D.N.Y. 1977).

Circuit have adhered to this requirement and have refused to find removability where a dollar figure in excess of the jurisdictional amount does not appear on the face of the complaint. *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938). In recent years, the Seventh Circuit has attempted to expand the application of this rule by finding jurisdiction is present if the benefit to the plaintiff *or* the detriment to the defendant could reasonably be expected to exceed $10,000, even where the complaint seeks no damages. *McCarty* v. *Amoco Pipeline Co.*, 595 F.2d 389 (7th Cir. 1979). That decision stretched the well-pleaded complaint rule beyond its previous limits, since it abandoned the four corners of the complaint to determine the presence or absence of the jurisdictional amount.

With its opinion in this case, the Court of Appeals has now pushed the well-pleaded complaint rule past its breaking point, by finding that the jurisdictional amount requirement is satisfied where one non-federal count of a complaint seeks damages "if appropriate" without specifying a dollar amount, and with no further facts in the record to indicate plaintiff's potential damages or defendant's potential detriment. In fact, this reference to damages was an afterthought to a non-federal claim seeking declaratory and injunctive relief. Consequently, the reference is superfluous, and under the "well-pleaded complaint" rule, the original Complaint was not removable. The Court of Appeals abandoned the jurisdictional amount requirement by reading it out of the statute.[6] Despite the clearly expressed intention of Congress, a complaint seeking an unspecified amount of money will be removable without regard to the monetary damages that will be incurred by the defendant in the Seventh Circuit but in no other circuit.

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[6]The jurisdictional amount issue is of great importance for future cases since it remains a requirement for removal under § 1441(a) based on diversity jurisdiction and, presumably, for removal under § 1441(c) based on non-federal separate and independent claims.

The Complaint was also not removable because during the first thirty-day period the Conference could not obtain the consent of co-defendants, the Illinois Defendants, to remove. In fact, on September 2, 1980, following the preliminary injunction hearing, during which the Illinois Defendants stated to the court that they favored the issuance of a preliminary injunction against the Conference (A-46 to 47), the Conference moved to realign the Illinois Defendants as plaintiffs. The Illinois Defendants objected, stating that the motion, if sustained, would aid removal. (A-49). The motion was denied.[7]

Accordingly, the original Complaint was not removable. The Conference's right to remove first arose upon plaintiff's filing of the March 25, 1981 amendment pursuant to 28 U.S.C. § 1446(b)¶ 2 (1976). The Court of Appeals' opinion which assumed the existence of federal jurisdiction from the original Complaint, where none existed, conflicts with the Court's opinion in *St. Paul Indemnity Co.* v. *Red Cab Co., supra*. The Court should resolve this conflict.

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[7] In February, 1981, plaintiff confessed to a motion by the University of Illinois dismissing it from any damage claims. (A-52). The March 25, 1981 amendments were directed only against the Conference. These amendments provided the first opportunity the Conference had to remove without having to obtain the consent of the Illinois Defendants who by then had become nominal parties. See 1A Moore's Federal Practice, ¶ 0.168[3.-5] p. 486 n. 32.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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David WILSON,

Plaintiff,

v.

INTERCOLLEGIATE (BIG TEN) CONFERENCE ATHLETIC ASSOCIATION, an unincorporated association et al.,

Defendants.

No. 81-2098.

United States District Court,
C. D. Illinois.
May 19, 1981

DECISION AND ORDER ON MOTION TO REMAND

ROBERT D. MORGAN, District Judge.

This is a civil action, originally filed in the Circuit Court for the Sixth Judicial Circuit, Champaign County, Illinois, as case number 80—C—801. Plaintiff is a student at the University of Illinois at Urbana-Champaign, is a member of the varsity football team, and the suit involves his eligibility to play intercollegiate football.

Plaintiff filed his original complaint in two counts on August 19, 1980, naming as defendants the National Collegiate Athletic Association (NCAA), the Big Ten Athletic Conference (Conference), Neale Stoner, as Athletic Director of the University of Illinois Athletic Association (Stoner), and the University of Illinois Athletic Association (UIAA). He sought declaratory judgment and injunctive relief. On August 26, 1980, plaintiff amended his complaint to name as alternative defendants the ten individual member schools of the Conference and the Conference Commissioner, Wayne Duke. Hearings were conducted in the state court on plaintiff's prayer for preliminary injunctive relief. Defendants, through legal counsel, participated in those hearings. A preliminary injunction in plaintiff's favor was granted on September 5, 1980. The circuit court dissolved that injunc-

tion on September 17, 1980. The Illinois Appellate Court, Fourth District, reinstated the injunction on September 19, 1980, and the Illinois Supreme Court, on October 3, 1980, denied leave to appeal. Plaintiff played football for the University of Illinois in the fall of 1980 under that injunction.

On March 25, 1981, plaintiff filed three "Additional Counts to Amended Complaint." The additional counts were directed only against defendant Conference. Conference filed a petition to remove the case to federal court on April 8, 1981. Plaintiff filed a motion to remand on May 4, 1981. The parties presented oral arguments on the remand motion on May 11, 1981, and have submitted briefs in support of their respective positions. For the reasons developed herein, the motion to remand must be denied.

I

Right to Remove Under 28 U.S.C. § 1446(b)

Plaintiff's original complaint,[1] entitled "Complaint for Declaratory Judgment and Injunction," is in two counts. Count One alleges that the NCAA[2] and Neale Stoner denied plaintiff the equal protection of the laws, as guaranteed by the Constitutions of the State of Illinois and the United States, by promulgating certain NCAA rules and applying them to plaintiff. Count Two alleges that the Conference, Stoner, and UIAA denied plaintiff procedural due process, as guaranteed by the Constitutions of the State of Illinois and the United States, during hearings that were held to deter-

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[1] Throughout this opinion the term "original complaint" denotes plaintiff's complaint as amended on August 26, 1980. The substantive claims and prayers for relief in the August 19 complaint and August 26 complaint are virtually identical. The August 26 amendment changed the alleged status of the Conference from a corporation to an unincorporated association and added the ten individual member schools of the Conference as defendants.

[2] NCAA was dismissed from the suit through stipulation on April 7, 1981.

mine the status of his eligibility to participate in intercollegiate athletics.

Both parties appear to concede that the original complaint was removable, as it stated a federal question. When defendants, for whatever reason, failed to seek removal within the time prescribed by statute, 28 U.S.C. § 1446(b), they waived their right to remove that action. *Fletcher* v. *Hamlet*, 116 U.S. 408, 6 S.Ct. 426, 29 L.Ed. 679 (1886); 28 U.S.C. § 1446(b)(¶ 2). The initial question before this court, therefore, is whether the additional counts, which plaintiff voluntarily filed in 1981, so changed the nature of the suit as to revive the right to remove. This court decides that plaintiff's voluntary amendments of March 25, 1981 did state several new federal causes of action against defendant Conference, thus reviving its right to remove.

Plaintiff's original complaint named Conference only in Count II (procedural due process). The amendments name Conference as the sole defendant, alleging violations of First Amendment rights to travel, study, associate and compete; racial discrimination under 42 U.S.C. § 1981; violation of unspecified civil rights under color of state law under 42 U.S.C. § 1983; conspiracy to discriminate against a class under 42 U.S.C. § 1985; failure to give full faith and credit under Article IV of the United States Constitution; violation of unspecified rights under the Fourteenth Amendment (all in Count III); violations of the Illinois antitrust statutes (Count IV); and sex discrimination by a public institution under 20 U.S.C. §§ 1681-83 (Title IX) (Count V).

Plaintiff argues that all of the counts arise out of a single body of facts and seek to redress a single injury, and thus constitute a single cause of action. The court cannot agree.

The determination of what constitutes a cause of action must be made here by looking to federal law, and the Supreme Court of the United States has stated:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."

American Fire & Casualty Co. v. *Finn*, 341 U.S. 6, 13, 71 S.Ct. 534, 95 L.Ed. 702 (1951), quoting *Baltimore S. S. Co.* v. *Phillips*, 274 U.S. 316, 321, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927).

The injury that is cognizable in a court of law is injury to a *legal right*. Plaintiff argues that the injury in this case is his ineligibility to play football. However, his present ineligibility, which he seeks to change or redress, is simply the *result* of the alleged injuries to his legal rights. Thus, plaintiff's complaint, although stating a single set of facts, alleges injury to as many as nine different legal rights, and so states nine separate causes of action against defendant Conference, eight of which are first pled in the amendments of March 25, 1981.[3]

The eight new causes of action are sufficiently different from the original cause of action to give rise to new federal questions that revive the right to remove. As stated above, Conference was named originally as a defendant only in the procedural due process count. The allegations in the new counts, while based on the same facts, advance substantially different legal theories and will involve substantially different proofs and defenses than the original suit. A right to remove may be revived by amendment when plaintiff states new facts, or puts the same facts on new legal grounds, *Galesburg & Kewanee Electric Ry. Co.* v. *Hart*, 221 F. 7 (7th Cir. 1915).

Another factor that is persuasive to the court in finding new causes of action is that the amendments changed the suit from one in equity to one at law. While the distinctions between suits in law and equity are no longer great, some do still definitely exist. Plaintiff's Counts I and II asked declaratory and injunctive relief, plus unspecified damages, "if appropriate." Plaintiff's jury demand was limited to

[3]This decision does not address the validity of any of plaintiff's allegations, and hence implies nothing with respect to their possible validity.

contested issues of fact. In Counts II, IV and V, plaintiff asks no injunctive relief, seeks millions in money damages, both compensatory and punitive, and demands jury trial on all issues. It is clear that such changes amount to more than technical refinements or mere pleading tactics, as plaintiff argues. Reading the amendments as a whole, they state new federal questions, thus defendant Conference had a revived right to remove under 28 U.S.C. § 1446(b)(1 2).

II

Right to Remove Under 28 U.S.C. § 1441(c)

Having found that Conference's right to remove had been revived by plaintiff's voluntary amendment, the court must examine the pleadings in light of § 1441(c)[4] to determine whether the case is now removable.

Following the previous analysis, the court finds that Counts III and IV are separate and independent causes of action which would be removable if sued upon alone. Briefly, they name only one defendant, although relying on the same facts as Counts I, II and IV, they will require substantially different proofs; and finally they seek different damages to vindicate violations of different rights than do the other counts. These factors meet the requirements set down in *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).

The court also finds that the removable separate and independent claims are joined with nonremovable claims. The pleadings must be evaluated in the form they are in at the time of removal. Thus, the complaint at this time consists of five counts. Counts I and II are nonremovable because their

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[4]28 U.S.C. § 1441(c): "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

removal was waived previously. Count IV is nonremovable because it is based solely on state law. Counts III and V are the removable claims, as previously discussed. Therefore, the court finds that the entire case is removable under 28 U.S.C. § 1441(c).

III

Procedure Perfecting Removal Under 28 U.S.C. § 1446

Plaintiff filed the amendments which revived the removability of this action on March 25, 1981. Defendant Conference filed its removal petition in the district court on April 8, 1981, well within the 30-day limit set down in § 1446(b). The court has reviewed the petition and finds it sufficient under § 1446(a). Since the removal is founded upon § 1441(c), only the defendant named in the separate and independent action is required to petition to remove. Joinder or consent of other defendants is not necessary, *14 Wright, Miller & Cooper, Federal Practice & Procedure,* § 3731 at p. 719; *1A Moore's Federal Practice,* at p. 453. So, even though the other defendants have waived any rights they had to remove, Conference does not suffer from their disability under the circumstances of this case. Thus, this court finds that defendant Conference has followed the procedure in § 1446 and that the case is properly removed to this court.

Finally, under § 1441(c), this court now does have jurisdiction over the entire case, including both federal and nonfederal claims. In the interest of judicial economy, all claims now pending will be determined in the federal case. The court has reviewed with care all of the cases cited by plaintiff to suggest contrary conclusions and considers them inapposite or unpersuasive.

Accordingly, IT IS ORDERED that the motion to remand is DENIED.

David C. WILSON,
Plaintiff-Appellant,

v.

INTERCOLLEGIATE (BIG TEN) CONFERENCE ATHLETIC ASSOCIATION,
an Unincorporated Association et al.,
Defendants-Appellees.

No. 81-2154.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 5, 1982.
Decided Jan. 26, 1982.

Robert I. Auler, Urbana, Ill., for plaintiff-appellant.

Charles L. Palmer, George V. Eighmey, Champaign, Ill., Byron L. Gregory, McDermott, Will & Emery, Chicago, Ill., for defendants-appellees.

Before BAUER, Circuit Judge, MARKEY, Chief Judge,[1] and POSNER, Circuit Judge.

POSNER, Circuit Judge.

This case, on the view we take of it, turns on the following question under 28 U.S.C. § 1446(b): if a case initially filed in state court is removable to federal court but the defendant waives his right to remove, under what circumstances will that right revive if the plaintiff subsequently amends his complaint to add new federal claims?

The plaintiff, David C. Wilson, today a quarterback for the New Orleans Saints, was in 1980 a transfer student at the University of Illinois from a junior college in California. The principal defendants are the Intercollegiate (Big Ten) Conference of Faculty Representatives, an association of ten midwestern universities, and those universities. The rules of the Conference, so far as relevant here, (1) limit a Big Ten student to four seasons of playing college football, and (2)

[1] Of the United States Court of Customs and Patent Appeals.

declare him ineligible in any season if he has failed to accumulate a specified minimum number of course credits (the number depends on what year of college he is in). When Wilson entered the University of Illinois in February 1980, he was in his third year of college and therefore ineligible to play beyond the (fall) 1980 season; and because the University refused to give him full credit for all the courses he had taken at his junior college, he was ineligible to play even in 1980 for want of the requisite accumulated credits. He sought a waiver of both rules, but after various interim decisions unnecessary to detail here the Conference refused to waive either one.

In August 1980, shortly before the beginning of the 1980 college football season, Wilson brought this suit in an Illinois state court. His complaint alleged that the Conference's refusal to waive its rules denied him equal protection of the laws and due process of law, in violation of both the United States and Illinois Constitutions. The complaint sought injunctive relief and damages. The defendants did not attempt to remove the case to federal court. The state court, Judge Clem, issued a preliminary injunction in Wilson's favor on September 5, 1980, holding that he had established a likelihood of prevailing on the merits of his constitutional claims. Judge Clem later dissolved the preliminary injunction when the defendants presented new evidence bearing on Wilson's academic progress (or rather lack thereof), but the Illinois Appellate Court reinstated the preliminary injunction on September 19 and the Illinois Supreme Court refused to review the appellate court's action. Because of the injunction, Wilson was able to play the whole 1980 football season.

We come to the critical stage of the proceedings. In March 1981 Wilson amended his complaint by adding several additional counts (and also by quantifying for the first time the damages he was seeking). The amended complaint maintained the focus of the original complaint on the Conference's refusal to waive its rules in Wilson's favor, but this refusal was now alleged to violate not only the equal protec-

tion and due process clauses of the U. S. and Illinois Constitutions but also several federal civil rights statutes (42 U.S.C. §§ 1981, 1983, and 1985); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (which deals with sex discrimination); the First Amendment to, and the full faith and credit clause of, the U. S. Constitution; and the Illinois Antitrust Act, Ill.Rev.Stat., ch.38, § 60–3. The defendants promptly filed a new petition to remove the case to federal district court. After denying Wilson's motion to remand the case to the state court, the district court granted summary judgment for the defendants on all counts and dismissed the complaint. Wilson appeals both from the order denying his motion to remand the case to state court and from the dismissal of the complaint.

If the only interests at stake in this litigation were the private interests of the parties, we might agree with the district judge that the case was properly removed to federal court. The original complaint was removable, notwithstanding the presence of a state claim in the complaint. The state claim was so closely related to the federal claim that if Wilson had brought the case in federal court the court would have had pendent jurisdiction over the state claim. Therefore the entire complaint was within the original jurisdiction of the federal courts and hence removable under 28 U.S.C. § 1441(a). See, e.g., *Hazel Bishop, Inc.* v. *Perfemme, Inc.*, 314 F.2d 399, 402–03 (2d Cir. 1963).

The defendants chose not to remove. They must have regretted this decision as they saw the case progress through the state-court system favorably to Wilson. Then Wilson (or rather his attorney) made what must have seemed to the defendants a colossal tactical blunder: amending the complaint to add a scattershot of new federal claims that no doubt struck the defendants (as they struck the district court) as insubstantial, and thereby reviving their right to remove and giving them a chance to escape from what had turned out to be an unfavorable state forum. Wilson was hoist with his own petard—and there we would leave him were it not

for the presence in this case of policy concerns, jurisdictional in nature and hence not waivable, relating to the power of the federal courts to divest state courts of jurisdiction over cases properly permitted to them.

Section 1446(b) of the Judicial Code provides that if a case filed in a state court, though removable to federal court, is not removed by petition filed within 30 days of the receipt of the complaint, it is not removable thereafter. The courts, however, have read into the statute an exception for the case where the plaintiff files an amended complaint that so changes the nature of his actions to constitute "substantially a new suit begun that day." *Fletcher* v. *Hamlet*, 116 U.S. 408, 410, 6 S.Ct. 426, 29 L.Ed. 679 (1886); see 14 Wright, Miller & Cooper, Federal Practice and Procedure § 3732, at 727–29 (1976), and cases cited therein. It is idle to pretend that the *Fletcher* test or any of the alternative formulations that the courts sometimes use (e.g., "an entirely new and different suit," *Cliett* v. *Scott*, 233 F.2d 269, 271 (5th Cir. 1956)) are self-defining. The right to revive must be determined in each case with reference to its purposes and those of the 30-day limitation on removal to which it is an exception, and against a background of general considerations relating to the proper allocation of decision-making responsibilities between state and federal courts.

The purpose of the 30-day limitation is twofold: to deprive the defendant of the undeserved tactical advantage that he would have if he could wait and see how he was faring in state court before deciding whether to remove the case to another court system; and to prevent the delay and waste of resources involved in starting a case over in a second court after significant proceedings, extending over months or even years, may have taken place in the first court. These considerations might be overborne in a case where a plaintiff, seeking to mislead the defendant about the true nature of his suit and thereby dissuade him from removing it, included in his initial complaint filed in state court an inconsequential but removable federal count unlikely to induce removal and

then, after the time for removal had passed without action by the defendant, amended the complaint to add the true and weighty federal grounds that he had been holding back. Cf. *Powers* v. *Chesapeake & O. Ry.*, U.S. 92, 99, 18 S.Ct. 264, 266, 42 L.Ed. 673 (1898); *Miles* v. *Stark*, 440 F.Supp. 947 (N.D.Tex. 1977). But this case presents the opposite pattern. Wilson tendered his fundamental federal claim, that defendants had violated his equal protection and due process rights under the U. S. Constitution, at the very outset. His amended complaint added only purely procedural count which clearly did not alter the character of the suit (the count based on 42 U.S.C. § 1983, which is a vehicle for redressing substantive violations of the Constitution, including equal protection and due process violations) and a number of other federal counts, all apparently makeweights and some never pressed at all. It seems inconceivable to us (and defendants do not argue) that Wilson's lawyer adopted this pleading sequence in order to discourage the defendants from exercising their right to removal, or that it could have had that effect.

But it would be too narrow a construction of the right of revival to limit it to cases where the plaintiff deliberately holds back his strong federal cards hoping to induce the defendant to waive his right to remove the original complaint. Amendments might fundamentally alter a complaint not because the plaintiff had been trying to mislead the defendant but because new facts had come to light in the course of pretrial discovery. In such a case—where the amended complaint in effect begins a new case—using the 30-day limitation in section 1446(b) to bar removal would not serve the purposes of the limitation in any significant way. The defendant's tactical advantage would be small because whatever favor or disfavor the state court had shown to his defense of the original complaint need not carry over to an amended complaint which by hypothesis kicks off an essentially new lawsuit. And judicial economy would not be promoted by forbidding removal because, again by hy-

pothesis, the defendant is seeking not to start an old case over in a new court but to litigate a new case in the new court.

The amendments in the present case did not change the original complaint so drastically that the purposes of the 30-day limitation would not be served by enforcing it. The amendments did not change the target of Wilson's attack or the nature of the relief sought. He still wanted the rules limiting his eligibility changed or waived and he still sought injucitive and monetary relief for the Conference's refusal to do so. The basic legal theory of his action—that the Conference rules, as applied to him, were unfair and discriminatory and that he had not been given a fair hearing in his efforts to obtain a waiver of them—was unchanged. There was thus no "abandonment of the original for a new cause of action," as in *Henderson* v. *Midwest Refining Co.*, 43 F.2d 23, 25 (10th Cir. 1930), or as in *Craig Food Indus.* v. *Taco Time Int'l, Inc.*, 469 F.Supp. 516, 521 (D.Utah 1979), where the amended complaint changed a diversity case into a federal-question case. The amendments here merely added constitutional and statutory references purporting to further show that the treatment of which Wilson complained was unlawful. That an additional state claim, based on the Illinois Antitrust Act, was also added to the complaint is not a ground for removal to federal court.

In fact this case illustrates very nicely the purposes behind the 30-day limitation. Removal to federal court long after the original complaint had been filed and substantial proceedings—unfavorable to the defendants—had taken place in the state courts interrupted an active litigation, thus reducing judicial economy, and delivered a substantial and unearned tactical advantage into the hands of the defendants. It is more likely that the defendants removed the case because they were doing badly in the state courts than because they felt that the amended complaint confronted them with a different case from the one they had been fighting in those courts. Nor, as we said before, is there any basis for supposing that the original complaint was

designed to lull the defendants into waiving their right to remove by concealing from them the true nature and dimensions of the plaintiff's federal case.

We do not wish to be understood as proposing new formulas for deciding when the right to remove revives after the 30-day deadline has passed. The issue does not lend itself to decision by verbal talismans. The intelligent decision of particular cases requires instead a sensitivity to the purposes of both the 30-day limitaion and its judicially engrafted exception. Another kind of sensitivity is also required of federal courts in dealing with this problem: sensitivity to the danger of encroaching unduly on the authority of the state courts. This case illustrates that danger. A state constutional issue that began by being litigated in the state-court system, favorably to the claimant be it noted, ended up by being decided unfavorably to the claimant by a federal district judge. It is true that even if the case had been properly removed to federal court, the court could have declined to exercise its pendent jurisdition and remanded the state claims. And a concern with the value of federalism involves a touch of irony in this case given the nature of the particular state claims: Judge Clem, in construing the equal protection and due process clauses of the Illinois Constitution, relied entirely on cases construing the counterpart clauses of the Fourteenth Amendment to the U. S. Constitution; and the Illinois Antitrust Act incorporates by reference, to the extent applicable, decisional law under the federal antitrust statutes. Ill.Rev.Stat., ch. 38, § 60–11. But although the interest of the state courts in adjudicating the particular state-law claims in this case may be somewhat attenuated, this feature of the case is idiosyncratic. It does not convert the state claims into federal claims (see Currie, Federal Jurisdiction 108–10 (2d ed. 1981)) and it does not weaken our conviction that the district courts, in interpreting and applying section 1446(b), should bear in mind, and where possible avoid, the frictions in a harmonious federal system that result when litigation involving state-law as well as federal-law issues is abruptly shifted into federal

court and the state proceedings, including here a preliminary adjudication on the merits, are set at naught.

The order of the district court, 513 F.Supp. 1062, denying the motion to remand is therefore reversed and the case remanded to that court for entry of an appropriate order remanding the case to the state court. The district court's judgment dismissing the complaint on the merits is vacated for want of federal jurisdiction.

So Ordered.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 26, 1982

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Howard T. Markey, *Chief Judge*[*]
Hon. Richard A. Posner, *Circuit Judge*

DAVID WILSON
Plaintiff-Appellant,

No. 81-2154 v.

INTERCOLLEGIATE (BIG TEN) CONFERENCE ATHLETIC ASSOCIATION, an Unincorporated Association, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.

No. 81 C 2093

Judge Robert D. Morgan

This cause was heard on the record from the United States District Court for the Central District of Illinois, Danville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the District Court Order denying motion to remand is REVERSED, with costs, and the case is REMANDED, with directions; the District Court Judgment dismissing the complaint is VACATED, in accordance with the Opinion of this Court filed this date.

[*] Of the United States Court of Customs and Patent Appeals.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 4, 1982

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Howard T. Markey, *Chief Judge*[7]

Hon. Richard A. Posner, *Circuit Judge*

DAVID C. WILSON
Plaintiff-Appellant,

No. 81-2154 v.

INTERCOLLEGIATE (BIG TEN) CONFERENCE ATHLETIC ASSOCIATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.

No. 81 C 2098

Robert D. Morgan, *Judge*

ORDER

On February 9, 1982, defendant-appellee Intercollegiate (Big Ten) Conference Athletic Association filed a petition for rehearing with suggestion for rehearing en banc. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the petition.[8] The petition is therefore *denied.*

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[7] Of the United States Court of Customs and Patent Appeals.

[8] Circuit Judge Harlington Wood Jr., did not participate in the consideration of the suggestion for rehearing en banc.

In The

Circuit Court

of the Sixth Judicial Circuit
Champaign County, Illinois

DAVID WILSON,	*Plaintiff,*	
v.		
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,		
INTERCOLLEGIATE (BIG TEN) CONFERENCE ATHLETIC ASSOCIATION, an Illinois Corporation,		**No. 80-C-801**
NEALE STONER, as Athletic Director, University of Illinois Athletic Association,		
UNIVERSITY OF ILLINOIS ATHLETIC ASSOCIATION, a non-profit Corporation,	*Defendants.*	

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

NOW COMES the Plaintiff, David Wilson, by his Attorneys, Auler Law Offices, and for his Complaint against the Defendants he alleges and states:

COUNT I

For Count I of his Complaint against Defendants National

Collegiate Athletic Association and Neale Stoner the Plaintiff alleges:

1. That all Defendants in this cause either reside in or do substantial business within Champaign County, Illinois, and that the facts of this cause arise out of an actual controversy in Champaign County, Illinois; Plaintiff seeks a declaratory judgment under § 57.1 and injunctive relief to be enforced in said County and State.

2. Defendant Neal Stoner is Athletic Director and chief administrative officer of the University of Illinois Athletic Association, a not-for-profit Illinois Corporation (hereinafter U of I AA) which conducts intercollegiate athletics for and under the supervision of the University of Illinois at its publicly-supported facilities.

3. That the Defendant Intercollegiate Conference (hereinafter Big Ten), is composed of the athletic arms of ten public and private universities which hold its stock beneficially; said Big Ten is regulated by the Athletic Directors of its stockholder universities sitting as its directors; its legislative, rule-making, and quasi-judicial functions are vested in ten (10) "Faculty Representatives" who meet as a body, and through their standing and special committees; the said Big Ten exercises authority over Defendant Stoner, Defendant U of I AA, and student athletes seeking to compete at member institutions by a system of rules of eligibility imposed and regulated by its tribunals and by penalties up to and including disqualification of individuals and, ultimately, expulsion of a member institution.

4. The Big Ten, Defendant Stoner and the U of I AA recognize, belong to and give full faith and credit to the rules and decisions of the NCAA which is an unincorporated Association of American Colleges and Universities who through the NCAA have established standards for eligibility

and competition of student athletes; and which hears disputes as to eligibility and violations in a quasi-judicial function. The NCAA maintains the power to declare individuals ineligible from post-season or championship NCAA events and to further discipline member institutions and conferences.

5. The Big Ten maintains its authority to limit the eligibility for competition at regular season, conference games of the Plaintiff David Wilson and to discipline the Defendant U of I AA if it should fail to enforce Big Ten or NCAA rules or decisions.

6. All of the Defendants purport to regulate the eligibility to compete of Plaintiff David Wilson at the U of I AA facility in Champaign County, State of Illinois and with other Big Ten and NCAA teams by rules and sanctions imposed on defendant Stoner and the U of I AA should he fail to enforce the dictates of the NCAA and the Big Ten.

7. That all of the aforesaid Defendants have established a system of subordination to rule-making, quasi-judicial procedures, and other administrative procedures which are designed to, and which in fact regulate intercollegiate athletic competition in the United States, more particularly, in the Big Ten Conference, and specifically at the U of I AA in Champaign County, Illinois; that the aforesaid system of relationships, memberships, regulation affect the public interest, the expenditure and use of public funds and facilities, and the rights, privileges, and opportunities of student athletes such as the Plaintiff David C. Wilson to compete in accordance with constitutionally proper and minimally fair standards and rules imposed upon them.

8. That the Plaintiff in September of 1977 was an eighteen-year-old college student in Fullerton, California, attending a junior college known as Fullerton College, the program of which was fully accredited and the athletic arm of which, as a two-year junior college was not eligible for membership in the NCAA, but it instead adhered to the

California Athletic Code and was a member of the South Coast Conference, and subject to its Committee on Eligibility; the aforesaid entity is a similar quasi-public institution in that it regulates and performs quasi-judicial functions which affect the use of public funds and facilities similarly to the NCAA and the Big Ten.

9. That prior to the commencement of classes, for which he was prospectively enrolled for fifteen (15) semester hours, thus being a regular student, David Wilson qualified for the Fullerton Football Team and in its first game of the year was injured on his first play from scrimmage.

10. That Plaintiff sustained a fracture of his right navicular bone which required him to wear a long arm spica cast for a period of three (3) months which disabled him from taking written notes and from functioning as a regular student in his course of study.

11. That the said Plaintiff was a young man inexperienced in interpreting complex and legalistic eligibility rules with respect to his possible transfer to various four-year academic institutions, and sought and received the advice of his academic counselor, his football coach, and his orthopedic surgeon that attempting to function as a full time student with his medical condition would seriously interfere with or defeat his academic efforts, and that dropping out of Fullerton College prior to attending any classes would not adversely affect his status either with the junior college, with its football program and his prospective two years of eligibility, nor with any future eligibility at a four-year institution; that Plaintiff had a right, and in fact, a recognized obligation under NCAA, Big Ten, and South Coast Conference rules and regulations to counsel with and rely upon the advice given him by his coach and academic counselor.

12. That Plaintiff was informed and relied upon the representations the aforesaid individuals had carefully studied various eligibility rules, and that under both South Coast and NCAA rules, Plaintiff's injury though early in the

season qualified under the "hardship rule" which the NCAA, the Big Ten, and South Coast Conference recognized, the net effect of which is to excuse from computation any season in which a football player is injured in the first twenty percent (20%) of the games, and to treat such participation as if it had not occurred for the purpose of counting seasons of eligibility.

13. That the South Coast Conference Eligibility Committee in fact granted Plaintiff the status sought and permitted him two (2) full years football competition at the institution in the fall of 1978 and 1979.

14. That Plaintiff was induced to accept and participate during these two (2) years because of the representations and advice of his coach and of his academic counselor at Fullerton College, and that he had a right to so rely.

15. That Plaintiff was recruited by the U of I AA as a player of great merit, and was promised scholarship assistance and the opportunity to play regularly at Illinois.

16. That Plaintiff enrolled for the Spring semester of 1980 and was informed that the NCAA, pursuant to its By-Laws, Article 4-1-(d)-2 would not recognize the formal grant of hardship by the South Coast Conference Eligibility Committee by way of giving such hardship status full faith and credit in computing future NCAA eligibility for post-season competition. Upon application to the NCAA, Plaintiff was informed that although he occupies a position identical to one in which a participant at a NCAA member school would be granted a hardship status for the single play of competiton, and granted four (4) full years of eligibility, that because he had sustained it at a junior college, and because of the application of the aforesaid rule, and because he had enrolled at a Division One NCAA member school, that he would only be eligible for one (1) year post-season competition.

17. That the application of the aforesaid rule creates failure of equal protection and due process with respect to the

Plaintiff in comparison with all other student athletes participating in football and injured during the first twenty percent (20%) of the season, and particularly with respect to junior college athletes so situated and transferring into Division One schools as opposed to Division Two and Three schools.

18. The specifications so created are irrational, serve no legitimate purpose and are a product of overreaching and improper and pointless regulation of public funds and facilities by the said NCAA.

19. That the Plaintiff was regulated by a quasi-public entity while a junior college student and that its determinations under an identical hardship rule are entitled to full faith and credit by the NCAA regardless of whether the Plaintiff selects a large (Division One) school or a small (Division Two or Three) school at which to complete his education and expend his remaining eligibility.

20. That upon application, the Defendant NCAA has informed Defendant Neale Stoner and U of I AA that Plaintiff is eligible for only one (1) year of post-season, championship intercollegiate athletic football competition and that his actual hardship which would, if sustained at an NCAA member institution have automatically qualified him for an additional year of competition, will not be recognized by the said NCAA.

21. That acting upon the said information, and pursuant to the requirements of the NCAA imposed upon Defendant Neale Stoner and the U of I AA as a member institution, Neale Stoner then declared Plaintiff to be eligible for only one year of post-season competition.

22. That the ruling interposed against the Plaintiff by the Defendant NCAA, and which it has caused to be enforced against him by Defendant Stoner and the U of I AA is in direct violation of Plaintiff's rights and protected interests under the Constitution of the State of Illinois and of the

United States Constitution in that he has been deprived of due process and equal protection.

23. That Plaintiff has been deprived of equal protection in one or more of the following ways:

a. that the NCAA discriminates against those athletes who begin their athletic careers at junior colleges rather than at four-year universities in that if Plaintiff had suffered the same injury while attending a four-year NCAA member university, he would have been automatically granted an extra year of eligibility under NCAA By-Law 4-1-(d)-2 by the said NCAA;

b. that if Plaintiff had chosen a Division Two or Division Three NCAA member school he would have been granted an aditional year of eligibility, thus recognizing and getting full faith and credit for the action of the South Coast Conference and thereby establishing its validity, reliability, enforceability, and appropriateness with respect to NCAA policy imposed upon small college football programs;

c. that the aforesaid violates due process in that it removes any fact-finding and procedural due process guarantees with respect to establishing the truth or falsity of the existence of such a hardship, with respect to any legitimate interests of the NCAA, in the case of transfer to a Division One school; and, at the same time, to automatically accept as valid, finding of such hardship by similar junior college entities in the event the individual transfers to a Division Two or Three NCAA school.

24. That the above-described classifications are arbitrary and capricious and that they are neither necessary nor rationally related to the accomplishment of a valid public end; and that they deprive Plaintiff of the quality of competition and the supposed fair treatment which the Defendant institutions were created to guarantee; and that such injury is irreparable and is not compensable by money damages since

the extent of his enjoyment of the sport per se is not calculable, nor are its moral and physical benefits to him calculable; moreover, the extent to which he would be able to progress in qualifying to become proficient enough to find employment as a professional athlete is incalculable with respect to the deprivation of a fair opportunity to do so by competing for the same number of years as would be tendered to a student athlete at an NCAA member school under similar circumstances.

25. That the Plaintiff desires not only to play intercollegiate football at the University of Illinois, but he is interested in, and is qualified as a prospect for, professional competition, as well as a future as a coach or athletic administrator, and the deprivation with respect to limited eligibility by the NCAA denies him constitutionally protected interests in these respects.

26. That the above-described violations of the Plaintiff's right to equal protection and due process is guaranteed by the aforesaid constitutions which will continue unless and until Defendants are enjoined by this Court.

27. That by reason of his prospective loss of one (1) year of intercollegiate athletic eligibility, Plaintiff has suffered and will continue to suffer irreparable injury to his reputation and standing in the athletic community and to his prospects as a professional athlete or coach from his inability to promote his career, practice and perform his skills, and to be viewed by professional scouts as a potential professional football player; he will continue to suffer mental stress and anxiety over the deprivation of an important right to which he was entitled, and to the waiver of which, under the reading of the NCAA provision, he was misled by his coach at the junior college.

28. Plaintiff has no plain, adequate, or speedy remedy at law to obtain any relief and this suit for declaratory and injunctive relief is his only means of securing such relief.

29. That Plaintiff is without funds; and that neither the nature of this cause nor the prospective inconvenience to Defendants in the event of wrongfully issued injunctive relief justify the imposition of a bond for a temporary restraining order, preliminary injunction, or permanent injunction should they issue.

WHEREFORE, Plaintiff:

a. demands trial by jury on any disputed issues of fact;

b. prays for a declaratory judgment that Defendants have improperly limited his eligibility to one (1) year; and

c. prays for injunctive relief by temporary restraining order, preliminary injunction and permanent injunction as the Court shall deem appropriate restraining Defendants from limiting Plaintiff's eligibility, both regular and post-season to compete in intercollegiate sports.

COUNT II

That for his Cause of Action against the Big Ten, Neale Stoner, and the U of I AA he states:

1. That he realleges as paragraphs one through twenty-nine (1-29) in this Count each and every paragraph of Count I, namely paragraphs one through twenty-nine (1-29).

30. That following the ruling by the NCAA limiting Plaintiff to one year of post-season competition, Defendant Stoner, Plaintiff, and Faculty Representative William Ferguson of the U of I AA petitioned the Big Ten for a determination (a copy of that petition is incorporated by reference and marked Exhibit A-1 through A-19):

a. That Plaintiff was eligible for two (2) years of varsity football competition in the Big Ten Conference, regardless of restrictions imposed by the NCAA upon

him reducing him to one (1) year of post-season competitive eligibility.

b. That Plaintiff be immediately eligible for competition in the 1980 football season.

c. That Plaintiff be permitted to receive scholarship assistance commencing in the Spring semester of 1980 and running through the completion of the sought-after two (2) year Conference eligibility.

31. That the aforesaid petition was made pursuant to, and always conforming with Big Ten rules, more specifically with Chapter four, Section three, Judicial Procedures, Subsection c, Waiver of Rules of Eligibility; and that the Big Ten has the power to grant the relief sought with respect to competition within the Conference and during the regular football season.

32. That the aforesaid matters were heard before the Eligibility Committee of the Big Ten at a meeting in Iowa City during April of 1980, and, pursuant to rule, Plaintiff was not permitted to be present personally or by counsel, no record of the proceedings nor any record of the debates were kept, no particular findings of fact were made, no opportunity for the presentation and the cross-examination of witnesses was afforded to the Plaintif or to William Ferguson, Faculty Representative of the U of I AA, and no constitutionally proper fact-finding procedure was followed with respect to factual determinations upon which granting or denying relief purported to be predicated.

33. That under § 4 of its chapter on procedures, the section immediately following Chapter 4, Section 3(c) which governs the procedures followed by the Eligibility Committee herein, procedures are set out for hearings to affect the continued eligibility of student athletes and member institutions in the event that misconduct or a violation of recruiting or eligibility rules, or other alleged defaults of the rules of the Big Ten are the subject; under those rules a student athlete is afforded the right to an attorney, a written record,

a preliminary investigation and written report, conclusions and findings of fact made by the Commissioner prior to the institution of formal proceedings, recommendations and a conciliation proceeding, written notice at any and all stages, and, if any individual including the student athlete should desire or request, a full hearing before the Compliance Committee in which not only the reality of conflicts of interest, but the appearance of inability to render an impartial decision shall be the subject of a disqualification proceeding on motion of any party; such hearings shall include continued right to counsel, right to testify and cross-examine, the right to present documentary evidence, the right to individually or through counsel make statements or arguments and to request the appearance of witnesses from any institution or administrative department of the Big Ten; in essence, an impartial, fair, and constitutionally impeccable procedure is established, for finding facts concerning alleged violations and other misconduct; no such procedure is established by rule nor was any such procedure followed with respect to the deliberations and fact-finding the Eligibility Committee in making factual determinations on which it predicated its rulings on the petition requesting relief by the Plaintiff. Plaintiff was not permitted to be present, to testify or present evidence, and, in fact, the entire proceeding by rule and in practice was conducted by the faculty representative of the U of I AA, William Ferguson; Plaintiff, under the rules aforesaid had no rights nor standing whatsoever before the Committee and the said Committee kept no record of any kind concerning its deliberations, its vote, nor the findings of fact upon which it predicated its decision.

34. According to Chapter 4-3-c-3 "Decisions of the Commissioner, the Eligibility Committee, or the faculty representatives shall be in writing and shall be circulated to each director of athletics, faculty representative, and the *involved student* (emphasis added).

35. This is the sole and only right granted to the student implying that he has any stake in the deliberations or

procedures of the Committee; at no time was the Plaintiff informed of the decision of the Committee either in writing or otherwise.

36. That, nevertheless, the Committee granted the Petition in part, permitting Plaintiff to commence competition in 1980 on condition that he earn fifty-one (51) semester hours prior to such commencement, but denied his request for two (2) years of varsity competition during the regular season, citing and adopting the NCAA ruling limiting him to one (1) season of post-season eligibility and thus lending full faith and credit to the NCAA finding, and fortuitously and improperly applying that finding to regular season competition when said was optional on the part of the Big Ten.

37. That following the hearing of the Committee on Eligibility, which was held in the Executive Session and under the strictures as aforesaid, Defendant Stoner, Faculty Representative Ferguson, on behalf of the U of I AA, and pursuant to Big Ten Rule, Chapter 4-3-c-2 which reads "If the decision is not unanimous it shall be referred automatically to the Faculty Representatives without report of the actual vote of the Committee. Otherwise, the decision of the Committee shall be final unless appealed by the Faculty Representative. The decision of the Faculty Representatives shall be final." Stoner & Ferguson were given the opportunity to elect whether or not to appeal by the Big Ten and its Eligibility Committee, which option would permit them, if exercised, to have the matter reconsidered by the full committee of Faculty Representatives.

38. The tender of such option to Defendant Stoner and Faculty Representative Ferguson under the aforesaid rule clearly establishes, even though the aforesaid Committee kept no records and operated in Executive Session that its finding was unanimously in favor of permitting Plaintiff to commence playing football in Illinois in the Fall of 1980.

39. That the aforesaid rule and its application established the clear right of the Plaintiff under 4-3-c-3 to be

informed in writing of the action of the Eligibility Committee, presumably for the purpose of meeting and counseling with the Faculty Representative and making a joint decision whether to carry an appeal to the full Committee of Faculty Representatives. Nevertheless, no information was ever supplied to Plaintiff by any person as to the partial victory and partial loss before the Eligibility Committee which by its vote granted one (1) year but permitted that year to be used in the 1980 Fall Football Season.

40. That without any authority whatsoever, and in violation of the aforesaid rule, requiring written notice to the involved student, the Plaintiff herein, and in violation of due process and equal protection, and without any inferential or constitutionally appropriate agency or authority, Defendant Stoner and Faculty Representative Ferguson elected to take an immediate appeal of Plaintiff Wilson's case to the full Committee of Representatives.

41. That the aforesaid Committee met within the hour and not only did not grant the original relief sought before the Eligibility Committee, to-wit: two (2) years commencing in 1980 and scholarship in the Spring of 1980; nor did they affirm the holding of the Eligibility Committee, to-wit: one (1) year to be used in the 1980 Football Season; in fact they removed and abridged the valuable right to compete in the Fall of 1980 which had just been secured for Plaintiff Wilson before the Eligibility Committee, and granted one (1) year of eligibility to be expended in the Fall of 1981.

42. The aforesaid act of Full Committee purported to be predicated upon Plaintiff earning fifty-one (51) semester hours by the beginning of classes in the Fall of 1980 and other conditions consistent with his status as a regular third-year student rather than a fourth-year student; the postponing of the year of eligibility could only be appropriate under the finding of fact he was in fact a fourth-year student.

43. The aforesaid actions of the Committee on Eligibility and the later appeal to the full Committee of Faculty

Representatives is incorporated in and summarized in a Big Ten document circulated to Defendant Stoner and titled "Summary of Petition Submitted to Academic Progress and Eligibility Committee" and is incorporated herein by reference as Exhibit B-1 through B-3. Other formal notification by letter from Eleanor A. Jessup to Professor William A. Ferguson purporting to summarize, in part, the findings and considerations before the full Committee are incorporated by reference herein as Exhibit C and appended hereto.

44. That the taking of an appeal from the finding of the Eligibility Committee was unwarranted, unconstitutional, and involved conflicts of interest on the part of Defendant Stoner, the Big Ten of which he is a director and the U of I AA and Faculty Representative Ferguson, who are involved in a status of stockholders, beneficial owners, agents, and decision-making operating officers of Defendant Big Ten.

45. That no where in any of the procedures involved in Plaintiff Wilson's petition is there any recognition of Plaintiff Wilson's interest therein except for his right to receive written notice of the action of the Eligibility Committee and later of the full Committee of Faculty Representatives, which right was abridged to his detriment; and that the fact-finding procedure, the quasi-judicial procedure, and the granting or withholding of waiver are all unconstitutionally vague, predicated upon lack of recognition of solid and constitutionally protected interests of Plaintiff, and involved an undue delegation of authority to the said Big Ten and its component parts in deciding the use of public facilities and monies and the deprivation of important portions of the lives of Plaintiff and other similarly situated.

46. That equity should enjoin the Defendant Big Ten, Defendant Stoner and the U of I AA, from taking advantage of the decision of Faculty Representatives depriving Plaintiff Wilson of his right to compete in the Fall of 1980 as a matter of temporary restraining order and/or preliminary injunction.

47. The nature of this case is such, and the interest of the parties is such that Court ought to preliminarily or temporarily enjoin or restrain the Big Ten and any of the Defendants in this cause from interfering with Plaintiff's right to compete in the Fall of 1980 without bond.

48. That Plaintiff has secured and has been credited for fifty-one (51) semester hours at the time of the filing of this cause and is qualified in every respect to play football in the Fall of 1980 under the terms of the ruling of the Committee on Eligibility.

49. That Plaintiff desires this Court to preliminarily or temporarily enjoin or restrain Defendant Big Ten and Neale Stoner and the U of I AA from enforcing any portion of the ruling made by the Committee on Faculty Representatives on appeal from the Committee on Eligibility pending full hearing of this entire Complaint so that the net effect would be Plaintiff could exercise his undisputed one (1) year of eligibility in the Fall of 1980 and that the further question of whether he is entitled to two (2) years of eligibility from the NCAA and Big Ten could then be more fully heard and determined after the taking of extensive and necessary discovery with respect to the operation of Big Ten and NCAA rules, and depositions of involved parties including respective witnesses on the West Coast.

50. That this is equitable and fair and that there clearly arises an indisputable right on the part of the Defendant, at a minimum, to the benefits of the ruling of the Committee of Eligibility.

WHEREFORE, Plaintiff prays:

a. That any disputed issues of fact herein be heard before a jury except those dealing with temporary or preliminary injunctive matters;

b. For a temporary restraining order and/or preliminary injunction without bond against the Defendants restraining them from interfering with David Wilson competing in the regularly scheduled football games in

the 1980 season of the University of Illinois Football Team;

c. For such other relief as the Court may deem just;

d. For damages, if appropriate, including attorney's fees and costs;

e. For a short date upon short notice to Defendants for a hearing on requests for a temporary restraining order and/or preliminary injunction with respect to the 1980 season.

NOW COMES, David Wilson, Plaintiff, first being duly sworn, and he states that the matters, allegations, and propositions of certitude contained in this Complaint are true.

DAVID WILSON
David Wilson

STATE OF ILLINOIS
COUNTY OF CHAMPAIGN } ss.:

SUBSCRIBED and SWORN to before me this 19th day of August, 1980.

SUSAN L. BAYLER
Notary Public

In The

Circuit Court

of the Sixth Judicial Circuit
Champaign County, Illinois

DAVID C. WILSON, *Plaintiff,* v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al, *Defendants.*	No. 80-C-801

ADDITIONAL COUNTS TO AMENDED COMPLAINT

NOW COMES David C. Wilson, plaintiff, pursuant to Ill. Rev. Stat. Ch. 110, Section 46, and leave of this Court, to add additional Counts of his Amended Complaint in the above captioned cause. Plaintiff alleges and states the following:

COUNT III

For Count III of his Amended Complaint against defendant Intercollegiate Conference of Faculty Representatives (Big Ten Conference) and its member institutions; The Trustees of Indiana University, a body politic; the Trustees of Purdue University, a body politic; Board of Regents University of Michigan, a body corporate; Board of Trustees of Michigan State University, a body corporate; Director of the State Board of Regents, University of Iowa; Board of Regents, University of Wisconsin, a corporate body; Board of Trustees, Ohio State University; Board of Regents of the University of Minnesota; and Northwestern University; plaintiff alleges and states the following:

1. All defendants in this cause do substantial business within Champaign County, Illinois, and that the facts of this

cause arise out of an actual controversy within Champaign County, Illinois; and said defendants do such business individually and through a voluntary unincorporated association known as the Intercollegiate Conference of Faculty Representatives (Big Ten Conference).

2. Said members of said unincorporated association, defendant Big Ten, are state and quasi-governmental entities except for Northwestern University which is a private University holding special charitable status under Illinois Law, and enjoying quasi-public status through public funding; and they have been and are doing substantial business within the State of Illinois, part of which is the regulation of plaintiff asserted herein.

3. At all times relative hereto, defendant Big Ten was an organization for the regulation and control of athletic activities, and functions as an entity controlling the athletic programs of its members, including defendant University of Illinois and student athletes such as plaintiff.

4. Each defendant member of defendant Big Ten Conference derives income from carrying on intercollegiate athletics and in so doing, acts under the color of state law in regulating, restricting, controlling, and supervising, athletic competition among its member institutions and student athletes of said member institutions.

5. The legislative, rule making, and quasi-judicial functions of the Big Ten Conference are vested in ten "Faculty Representatives" who meet as a body, and through their standing and special committees, the Big Ten Conference exercises authority over student athletes seeking to compete at member institutions, by a system of rules of eligibilty imposed and regulated by its tribunals and by penalties including suspension and disqualification of individuals from competition and sanctions on member institutions.

6. Said Faculty Representatives have been delegated wide discretion to use, withhold, and regulate publicly

funded facilities and property, part of which are owned and controlled by the State.

7. The Big Ten, and its individual member institutions, belong to and give full faith and credit to the rules and decisions of the NCAA which is an unincorporated association of American Colleges and Universities, who through the NCAA have established and enforced standards for eligibility and competition of student athletes.

8. All defendants named in this Count, through the Big Ten Conference and its faculty representatives, purport to regulate the eligibility of plaintiff David C. Wilson to compete for the University of Illinois Football Team, through the Big Ten's aforesaid system of regulation, restriction, and supervision; and said regulation of plaintiff's eligibility by defendants has arbitrarily and capriciously deprived plaintiff of equal protection and due process under the color of state law.

9. Plaintiff, in September, 1977, was an 18 year old college student in Fullerton, California, attending a two-year junior college, known as Fullerton Junior College, which as a two-year junior college was not eligible for membership in the NCAA, but was instead a member of the South Coast Conference, which adhered to the California Athletic Code.

10. Fullerton Junior College, as a member of the South Coast Conference, was subject to the conference's committee on eligibility, which is a quasi-public entity that regulates and performs quasi-judicial functions which affect the use of public funds and facilities concerning athletic competition among member institutions and student athletes of those institutions, and therefore is similar in nature to the NCAA and the Big Ten.

11. Prior to commencement of classes David C. Wilson qualified for the Fullerton Junior College football team and in its first game of the year was injured on his first play from scrimmage.

12. Plaintiff sustained a fracture of his right navicular bone which required him to wear a long spica cast for a period of three months which disabled him from taking notes and from functioning as a regular student in his course of study; and as a result of said injury and its accompanying medical treatment, upon the advise of his counselor, coaches and doctors, plaintiff withdrew from classes at Fullerton J.C. before the commencement of the fall semester.

13. Fullerton Junior College, through its faculty representative to the South Coast Conference, petitioned the eligibility committee of the South Coast Conference, to exclude from computation in determining seasons of eligibility of David C. Wilson, the 1977 season in which he had been hurt. Said petition requested relief under the Conference "hardship rule", adhered to for over 20 years, which is identical to the "hardship rule" recognized and employed by the NCAA and the Big Ten, the net effect of which is to excuse from computation any season in which a football player is injured in the first 20% of the games in a season, and treat such participation as if it had not occurred for the purpose of counting seasons of eligibility.

14. Upon consideration of plaintiff's petition, the South Coast Conference Eligibility Committee in fact granted plaintiff the status sought and permitted him two full years of competition at the Fullerton Junior College in the fall of 1978 and 1979 because plaintiff was injured and had participated in fewer than 20% of the games in the fall of 1977.

15. Plaintiff participated in football competition in the South Coast Conference during the fall of 1978 and the fall of 1979 and was recruited by the University of Illinois to play football for the University of Illinois football team as a player of great merit, and was promised scholarship assistance and the opportunity to play at Illinois.

16. Plaintiff enrolled in the University of Illinois for the Spring Semester of 1980 and was infomed that the NCAA, pursuant to its bylaws, Article 4-1-(d)-2 would not recognize

the formal grant of hardship by the South Coast Conference Eligibility Committee, and would not give that grant of hardship status full faith and credit in computing future NCAA College eligibility for post season competition. Upon application to the NCAA and Big Ten, plaintiff was informed that he would only be eligible for one year of post-season competition, although he occupied at the time, a position identical to one in which a student athlete injured while participating at an NCAA or Big Ten member institution would be granted a hardship status, and granted four full years of eligibility.

17. The aforesaid ruling interposed against plaintiff by defendants NCAA and Big Ten is a direct violation of plaintiff's rights and protected interests under the Constitution and laws of the State of Illinois and under the Constitution and laws of the United States of America, in that he has been deprived of due process and equal protection; and has been deprived of the rights and liberties guaranteed to citizens to travel, to associate, to study, and to compete freely.

18. Through the University of Illinois faculty representative plaintiff petitioned the Eligibility Committee of the Big Ten Conference for a waiver of the aforesaid rule and to be granted two full seasons of eligibility for conference competition. Plaintiff petition concerning the aforesaid matter was discussed and determined before a meeting of the Eligibility Committee of the Big Ten which took place in Iowa City during April of 1980 and the committee denied the relief requested by plaintiff and granted plaintiff only one year of eligibiltiy for conference competition which could be taken in the fall of 1980.

19. Plaintiff was not permitted to be present personally or to appear by Counsel at the aforesaid meeting, and no record of the proceedings nor any record of the debates were kept, no particular findings of fact were made, no opportunity for the presentation and cross-examination of witnesses was afforded to the plaintiff or to the University of Illinois faculty representative, and no constitutionally proper fact

finding procedure was filed with respect to actual determinations upon which granting or denying relief to plaintiff were purported to be predicated.

20. Without consulting plaintiff or informing him of the decision of the Eligibiltiy Committee, an appeal of the decision of the Eligibility Committee was taken by the University of Illinois Faculty Representative directly to the full body of Faculty Representatives, in flagrant violation of the established rules of the Big Ten Conference and due process, but in accordance with the precedent of the Big Ten Conference of dealing with student-athletes in abstentia and without notice or adequate representation.

21. The full body of Faculty Representatives summarily denied plaintiff's appeal of the decision of Eligibility Committee granting plaintiff only one year of eligibility for conference competition which could be taken in the fall of 1980; and contrary to the written and established rules of the Big Ten Conference, the full body of Faculty Representatives *sua sponte* withdrew the decision of the Eligibility Committee and ordered that plaintiff not be allowed to participate in conference competition until the fall of 1981.

22. Although the Big Ten Conference, through its full committee of Faculty Representatives and the Eligibility Committee of Faculty Representatives, had the power to grant the relief sought by plaintiff with respect to competition within the conference during the regular football season, the Big Ten Conference chose not to grant the relief sought by plaintiff and refused plaintiff's petition; and said refusal and failure was arbitrary, capricious, and violated the rights, privileges and immunities guaranteed plaintiff under the Constitution and laws of the United States and the State of Illinois.

23. Plaintiff desires not only to play intercollegiate football at the University of Illinois, but is also interested in, and is well qualified, as a prospect for a professional football

competition as well as future employment as coach or athletic administrator.

24. Success in the Big Ten Conference and NCAA competition is necessary if plaintiff is to be able to prepare for a position as a professional athlete, or as a coach or athletic administrator.

25. The loss of one year of intercollegiate athletic eligibility has caused plaintiff to suffer and will continue to cause him to suffer injury to his reputation and standing in the athletic community, and to his prospects as a professional athlete or coach due to his inability to promote his career, practice and perform his skills, participate in a high level of athletic competition, and to be viewed by professional scouts as a potential professional football player.

26. Plaintiff has further suffered serious and severe mental distress and strain and has been subjected to scorn, ridicule, and obloquy from the public, his teammates, and his peers, as a result of his inability to compete beyond one season.

27. Through the aforesaid actions defendants have acted under the color of state law to purposefully deprive plaintiff of his civil rights as guaranteed by the Fourteenth Amendment, Article IV of the U. S. Constitution, and 42 U.S.C., § 1981, § 1983 and § 1985 and the First Amendment.

28. Through the aforesaid actions defendants have acted under the color of state law in an arbitrary and capricious fashion and in so doing have deprived plaintiff of his civil rights as guaranteed by the First and Fourteenth Amendments, Article IV of the Constitution and 42 U.S.C., § 1981, § 1983, and § 1985.

29. Through the aforesaid actions all defendants have purposefully acted under the color of state law in an arbitrary and capricious manner to deprive plaintiff of a fair and meaningful forum for the determination of issues which have a direct and immediate effect upon the civil rights and

liberties of the plaintiff as guaranteed by the First and Fourteenth Amendment, Article IV, of the U. S. Constitution, and 42 U.S.C., § 1981, § 1983, and § 1985.

WHEREFORE, plaintiff prays:

a. for damages in the amount of Nine Million Dollars ($9,000,000.00).

b. for punitive damages in the amount of Nine Million Dollars ($9,000,000.00).

c. for a declaratory judgment that defendants have improperly limited plaintiff's eligibility to one year;

d. for costs of this suit and reasonable attorneys fees;

e. plaintiff demands trail by jury.

COUNT IV

For Count IV of his Amended Complaint against defendant Intercollegiate Conference of Faculty Representatives (Big Ten Conference) and its member institutions: the Trustees of Indiana University, a body politic; the Trustees of Purdue University, a body politic; the Board of Regents, University of Michigan, a body corporate; the Board of Trustees of Michigan State University, a body corporate; director of the State Board of Regents, University of Iowa; Board of Regents, University of Wisconsin, a corporate body; Board of Trustees, Ohio State University; Board of Regents of the University of Minnesota; and Northwestern University; Plaintiff alleges and states the following:

1. Plaintiff realleges and restates paragraphs 1-26 of Count III as Count 1-26 of Count IV.

27. the NCAA, the Big Ten Conference and its member institutions, are engaged in substantial economic activity in Illinois and are subject to the Illinois anti-trust statute, Ill.Rev.Stat.Ch.38§60.

28. The defendants named in this Count have willfully conspired to restrain student-athletes, including plaintiff,

who attend or have attended junior colleges, institutions which are not members of the NCAA and the Big Ten Conference from developing their athletic skills to a level which would allow said student-athletes to compete on an equal basis with other student-athletes and to compete successfully in professional football; and specifically plaintiff from competing to his fullest potential in both collegiate football and his desired career of professional football, in violation of Ill.Rev.Stat.Ch.38,§60-3.

29. Defendants named in this Count have willfully conspired to restrain student-athletes including plaintiff, who attend or who have attended junior colleges, institutions which are not members of the NCAA and Big Ten conference from competing for and obtaining grants-in-aid and other scholarship assistance, in violation of Ill.Rev.Stat.Ch.-38§60-3.

30. Such restraints on competition cannot be justified for an allegedly noncommercial educational purpose and in the alternative are more restrictive than would be reasonably necessary to meet any legitimate goal of aforesaid defendants.

31. The State of Illinois through its interest in and responsibility for the activity of its state supported educational institutions, and students at those institutions, has a special interest and need to insure that such restraints on competition do not exist or in the alternative, if some restraint is appropriate, that it be applied indiscriminately and in the least restrictive manner possible.

32. The existence and effect of the aforesaid rule, and the aforesaid action of defendants, have severely injured property and business rights and interest of plaintiff, in restraining his ability to compete and his employment opportunities in professional football and other athletically related careers.

WHEREFORE, plaintiff prays:

a. for a declaratory judgment that defendants have improperly limited plaintiffs eligibility to one year;

b. for damages in the amount of Nine Million Dollars ($9,000,000.00) and whatever relief this court may deem just;

c. for exemplary and punitive damages in the amount of Twenty Seven Million Dollars ($27,000,000.00).

d. for costs of this suit and reasonable attorneys fees;

e. plaintiff demands trial by jury.

COUNT V

For Count V of his Amended Complaint against defendants Intercollegiate Conference of Faculty Representatives (Big Ten) Conference and its member institutions; the Trustees of Indiana University, a body politic; the Trustees of Purdue University, a body politic; Board of Regents, University of Michigan, a body corporate; Board of Trustees of Michigan State University, a body corporate; Director of the State Board of Regents, University of Iowa; Board of Regents, University of Wisconsin, a corporate body; Board of Trustees, Ohio State University; Board of Regents of the University of Minnesota; and Northwestern University; plaintiff alleges and states the following:

1. Plaintiff realleges and restates paragraphs 1-26 of Count III as paragraphs 1-26 of Count V of his Complaint herein.

27. The aforesaid rule, employed to effect the eligibility of plaintiff, and the actions and the Big Ten Conference in interpreting and applying said rule, effect and apply to male student-athletes only, and do not effect and apply to female student-athletes.

28. The aforesaid rule and its application discriminates against plaintiff because of his sex;

29. The Plaintiff was excluded from competition in Big Ten Conference games and limited to one year of eligibility solely because of his sex; and participation in the University of Illinois football program is an activity which is part of an educational program and activity receiving federal financial assistance;

30. Defendants' exclusion of plaintiff, David C. Wilson, from participating in Big Ten Conference games and limiting his participation to one year of eligibility constitutes a violation of Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681-1683.

31. Plaintiff has been severely injured in the aforesaid manner as a result of defendants discrimination against plaintiff because of his sex.

WHEREFORE, plaintiff prays:

a. for damages in the amount of Nine Million Dollars ($9,000,000.00) and whatever other relief this court may deem just;

b. for a declaratory judgment that defendants have improperly limited plaintiff's eligibility to one year;

c. for costs of this suit and reasonable attorneys fees;

d. for punitive damages in the amount of Nine Million Dollars ($9,000,000.00).

e. plaintiff demands trial by jury.

Respectfully submitted,

DAVID C. WILSON

By: ROBERT I. AULER
Robert I. Auler

AULER LAW OFFICES
202 W. Green Street
Urbana, Illinois 61801
(217) 384-3080

In The

Circuit Court

of the Sixth Judicial Circuit
Champaign County, Illinois

DAVID WILSON, *Plaintiff,* vs. **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,** *Defendants.*	No. 80-C-801

REPORT OF PROCEEDINGS

REPORT OF PROCEEDINGS at the hearing in the above-entitled cause before the Honorable Harry E. Clem, on the 27th day of August, 1980.

APPEARANCES:

Mr. Robert Auler,
Attorney at Law
Appearing on behalf of the Plaintiff;

Mr. Byron Gregory
Mr. Steven Hoeft
Mr. Cameron Dobbins
Attorneys at Law
Appearing on behalf of the Big Ten Conference, Wayne Duke, etc.;

Mr. Charles Palmer
Mr. James J. Costello
Mr. Donald Henss
Attorneys at Law
Appearing on behalf of the Defendant University of Illinois Board of Trustees;

Mr. George Miller
Attorney at Law
Appearing on behalf of Defendants Neale Stoner and University of Illinois Athletic Association.

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MR. PALMER:

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I wish that I didn't have to take this position because I want to be, on behalf of my client, as I know it wants to be, totally supportive of this conference and its rules, and it is. But it has got to be supportive of its student athletes at the same time and it's got to take a posture in a matter such as this that requires the enforcement of those very rules it lives by as a member of the conference. And there is where the problem arises. *It is, therefore, the University's position in this case that it is absolutely supportive of the issuance of the temporary injunction on behalf of the Plaintiff.*

MR. AULER: Preliminary?

MR. PALMER: Preliminary injunction.

THE COURT: Mr. Miller, you may argue.

MR. MILLER: *Your Honor, I wish to adopt what my colleague has said* and be allowed five to seven minutes more to touch upon something that has disturbed me and which I think has been developed by further analysis that was alluded to by Mr. Gregory in regard to the rule that we have spent so much time talking about on Page 12 of the rule handbook at the bottom of the page, this Eligibility Committee and the appeal from it. . . .

• • •

Now, I came into this case with the pronouncement that I wanted to be neutral. I felt that I was in between the Big Ten and the Plaintiff. As I heard the evidence, I could not help myself from moving from that position, and now I'm left, after the impassioned plea of counsel for the Big Ten, a plea that has my admiration, with my own summation that I have heard irony and I have heard hypocrisy and I've observed self-righteousness. The Big Ten was formed to recognize student athletes and yet they say that they appraise, they evaluate academic progress, but they do not

evaluate or recognize degrees of athletic competence. They say that their concern is with athletic progress ignoring the reality that all of us admire, the student athlete, the college degrees of the Phi Beta Kappas, that the faculty members, that everyone in the college town plead for the better football team, they thrill to meet Dave Wilson, they revere their coach. Pro football is on the screens of all of us on Monday night. It's big business in college and it's big business outside of college and everyone pleads for it and it swells the coffers of the University, and they tell us that all they care about is academic progress. Hypocrites—and hiding behind self-righteousness.

My seven minutes are up.

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT CHAMPAIGN COUNTY, ILLINOIS

I, MARY M. FRAME, an Official Court Reporter for the Circuit Court of Champaign County, Sixth Judicial Circuit of Illinois, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable Harry E. Clem, Judge of said Court.

MARY M. FRAME
Official Court Reporter

Dated this 31st day
of October, 1980.
(Emphasis added).

In The

Circuit Court

of the Sixth Judicial Circuit
Champaign County, Illinois

DAVID WILSON,
Plaintiff,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Defendants.

No. 80-C-801

REPORT OF PROCEEDINGS

REPORT OF PROCEEDINGS at the hearing in the above-entitled cause before the Honorable Harry E. Clem, on the 2nd day of September, 1980.

APPEARANCES:

Mr. Robert Auler
Attorney at Law
Appearing on behalf of the Plaintiff;

Mr. Byron Gregory
Mr. Steven Hoeft
Mr. Cameron Dobbins
Attorneys at Law
Appearing on behalf of the Big Ten Conference, Wayne Duke, etc.;

Mr. Charles Palmer
Mr. James J. Costello
Mr. Donald Henss
Attorney at Law
Appearing on behalf of the Defendant University of Illinois Board of Trustees;

Mr. George Miller
Attorney at Law
Appearing on behalf of Defendants Neale Stoner and University of Illinois Athletic Association.

• • •

MR. PALMER:

• • •

Now, upon reflection what concerns me most is that that dismissal was sought solely to remove an Illinois resident as a defendant and then the request was made to realign the other defendants as plaintiffs rather than defendants. *In order to serve as the basis for an attempt to remove this from the Court's jurisdiction under circumstances, then when the contention would be made we are the only defendant, everybody else are plaintiffs, and therefore, when we want it removed, it will be removed because of some federal question to another Court, I feel that I may, by agreeing to that initially for a different reason, have been had and I don't like that idea,* and should the Court feel that my request at this time, namely, that we be left designated a defendant and that procedurally Mr. Gregory and the Big Ten's rights be protected with reference to these matters of procedure, opening and closing, cross-examination, should the Court not agree with my contention, it is my further request that I be allowed to withdraw my agreement to the dismissal of Mr. Duke because *if the only purpose of all of this is to lay the foundation for a removal to another court, I do not wish to join voluntarily in being a part of that.*

• • •

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT CHAMPAIGN COUNTY, ILLINOIS

I, MARY M. FRAME, an Official Court Reporter for the Circuit Court of Champaign County, Sixth Judicial Circuit of Illinois, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into

typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable Harry E. Clem, Judge of said court.

MARY M. FRAME
Official Court Reporter

Dated this 30th day
of December, 1980.
(Emphasis added).

In The

Circuit Court

of the Sixth Judicial Circuit
Champaign County, Illinois

DAVID WILSON, *Plaintiff,* v. **NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, etc.**	No. 80-C-501

MOTIONS

REPORT OF PROCEEDINGS

REPORT OF PROCEEDINGS before the HONORABLE HARRY E. CLEM, on the 20th day of February, 1981.

APPEARANCES:

Mr. Robert Auler,
for the Plaintiff.

Mr. George Bryan
for National Collegiate Athletic Association

Mr. Don Henss

Mr. James J. Costello

Mr. Charles L. Palmer
for Board of Trustees, University of Illinois

Mr. Byron Gregory

Mr. D. Cameron Dobbins

Mr. Roger Wenthe
for Intercollegiate College of Faculty Representatives.

Kathy Struck
Official Reporter

• • •

MR. AULER: *Your Honor, there is a motion on file by the University of Illinois claiming protection under the Court of Claims Act from suits before the Circuit Court effecting [sic] it financially. To the extent that that goes to our claim for damages. We believe they are correct and we confess that motion.* That may speed up the process and avoid having to hear that motion as well.

MR. PALMER: May it please the court. There is—there has been filed a motion to strike by the defendant the Board of Trustees of the University of Illinois which is directed to any and all claims for damages or attorney's fees by the plaintiff against the Board of Directors of the University of Illinois. It was my understanding that back in January that all matters unresolved but of file would be heard today and therefore, I do not have separate notice of the hearing today of that motion but had filed it heretofore and had served all counsel. I will, of course, accept plaintiff's representation of acceptance and the courts granting of that motion but I do want to represent to the court and the record that prior to this moment I had not had that representation although I appreciate it now and prior to today I had no knowledge of the amendments to the complaint which were sought which I now understand involving any kind of damages are not directed to my client.

MR. AULER: *For that reason I was convinced by the force of your motion.*

• • •

WHICH WERE ALL OF THE PROCEEDINGS HAD IN THE ABOVE ENTITLED CAUSE ON SAID DATE.

KATHY STRUCK
Official Reporter

(Emphasis added).

STATUTES CONSTRUED

28 U.S.C. § 1441(a), (b) (1976): Actions Removable Generally

> (a) Except as otherwise expressly provided by Act of Congress, and civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1446(b) (1976): Procedure for Removal

> (b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

28 U.S.C. § 1447(c) (1976): Procedure After Removal Generally

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Office - Supreme Court, U.S.
FILED
JUL 2 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-2208

INTERCOLLEGIATE (BIG TEN) CONFERENCE OF FACULTY REPRESENTATIVES, INDIANA UNIVERSITY, UNIVERSITY OF IOWA, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, UNIVERSITY OF MINNESOTA, NORTHWESTERN UNIVERSITY, OHIO STATE UNIVERSITY, PURDUE UNIVERSITY and UNIVERSITY OF WISCONSIN,

Petitioners,

vs.

DAVID C. WILSON,

Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ROBERT I. AULER
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July 1, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-2208

INTERCOLLEGIATE (BIG TEN) CONFERENCE OF FACULTY REPRESENTATIVES, INDIANA UNIVERSITY, UNIVERSITY OF IOWA, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, UNIVERSITY OF MINNESOTA, NORTHWESTERN UNIVERSITY, OHIO STATE UNIVERSITY, PURDUE UNIVERSITY and UNIVERSITY OF WISCONSIN,

Petitioners,

vs.

DAVID C. WILSON,

Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Respondent, David C. Wilson, respectfully prays that a Writ of Certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 26, 1982, and for costs and expenses.

QUESTION PRESENTED FOR REVIEW

1. Whether an order remanding a removed case to State Court is reviewable by appeal or otherwise.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 668 F.2d 962.(A-1) The opinion of the United States District Court for the Central District of Illinois is reported at 513 F.Supp. 1062.

JURISDICTION

This Court does not have jurisdiction to review a remand to State Court under 28 U.S.C. § 1447(c and d). (A-9)

STATUTES CONSTRUED

28 U.S.C. § 1446(b)

28 U.S.C. § 1447(c)(d) (1976)

The text of these Statutes appears at A-9.

STATEMENT OF THE CASE

While the only basis for review asserted here violates the Section 1447(d), prohibition on review of decisions remanding cases to State Court, for some reason Petitioner has felt the need to make assertions about the underlying facts of the case, as if they bore upon the removal issue, and has done so, recklessly, at a minimum.

It is necessary, then, to respond to the misstatements in Petitioner's Statement of the Case, although obviously irrelevant to the issue upon which Petitioner seeks a new form of review.

Respondent Wilson now plays professionally. However, he did far more academically than attend "some classes" at Illinois. He is an upper Junior who is in excellent standing for readmission.

He never suffered from ". . . a lack of academic progress . . ." at his Junior College. His progress was fully accredited and transferable anywhere. Only an obscure

rule honored by the Conference in its breach (discovery shows 116 waivers of the rule in 119 petitions within the last 4 years), required a perfunctory petition for its waiver upon Wilson entering a Big Ten School.

Petitioner conveniently forgets that its appropriate Eligibility Committee *did* waive the rule preventing immediate eligibility. Another committee (the trial Court found) violated the Conference rules and purported to improperly remove the waiver once granted.

This case is one resolved by reference to Petitioner's own rules and the rights they have created in Respondent, as much as by normal statutory or Constitutional sources of right.

Central to the issue on review has been the concession below by Petitioner that the cause was initially removable. [See Petitioner's original Petition for Removal, paragraph 5, (A-12)].

He asserts error in the Seventh Circuit opinion finding no "brand new lawsuit" inherent in certain amendments clarifying the theory of previously made constitutional and statutory Federal claims and adding only State theories. He further asserts that such error (if made) is reviewable here.

SUMMARY OF ARGUMENT

In briefest summary, the Petitioner contends that this Court should review this cause, ignoring the provision against such review, merely because in remanding the cause to State Court the Seventh Circuit failed to chant the correct incantation and paraphrased it instead. Not since the distinction between trespass and case has so technical an argument been made with so straight a face.

An order remanding a removed case to State Court is not reviewable by appeal or otherwise. Section 1447(d) of the

Judicial Code, 28 U.S.C. § 1447(d) (1976), provides that an order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. The purpose of this statute is to bar the type of review requested here by Petitioner, "to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand."

The Court of Appeals remanded the case to State Court for jurisdictional reasons and therefore, that decision is not reviewable by appeal or otherwise. This Court in *Thermtron Products, Inc.* v. *Hermansdorfer*, infra, held that Section 1447(d) bars review of all remand orders issued pursuant to 28 U.S.C. § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. Section 1447(c) provides that if it "appears that a case was removed improvidently and without jurisdiction, the District Court shall remand the case." The Court of Appeals remanded this case for reasons clearly within the realm of Section 1447(c) and, therefore, review is prohibited by Section 1447(d).

The Court of Appeals based its remand order on grounds that the case was improvidently removed and, therefore, that decision is not reviewable. The Court of Appeals in *Wilson* based removal on the grounds that petitioner failed to remove within the 30 day statutory time period. Various courts have held that failure to comply with the statutory time requirement for removal was the sort of defect which makes a case "improvidently" removed. Even though the Court of Appeals did not specifically use the magic words of Section 1447(c), it is apparent that at the time of the remand order the Court held the case was to be remanded under that section; thus the unavoidable inference that it felt the case was removed "improvidently and without jurisdiction." Such a holding is well within Section 1447(c) and, therefore, not reviewable on appeal or otherwise.

The decision of the Court of Appeals accords with the decisions of this Court and lower federal courts. Petitioner

falsely and fallaciously contends that the decision of the Court of Appeals in *Wilson* is contrary to this Court's decision in *Thermtron Products, Inc.* v. *Hermansdorfer*, infra; however, this is fallacious. The Wilson remand, on jurisdictional grounds, is clearly in accord with the decisions of this Court.

REASONS FOR NOT GRANTING THE PETITION

I. AN ORDER REMANDING A REMOVED CASE TO STATE COURT IS NOT REVIEWABLE BY APPEAL OR OTHERWISE.

Section 1447(d) of the Judicial Code, 28 U.S.C. § 1447(d) (1976), provides that an order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. This statute constitutes a complete bar to the review of remand orders.

Mr. Justice Rehnquist, in his dissent, to *Thermtron Products, Inc.* v. *Hermansdorfer* 423 U.S. 336, 46 L.Ed.2d 542, 96 S.Ct. 584 (1976), outlined Congress' purpose in barring review of remand orders.

> "Congress' purpose in barring review of all remand orders has always been very clear—to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction works a significant interference in the conduct of litigation commenced in state court . . . If the party opposing a remand order may obtain review to litigate whether the order was properly pursuant to the statute, his ability to delay and to frustrate justice is wide ranging indeed."

The review sought in this case is exactly what Congress intended to bar by the creation of Section 1447(d). In *Wilson* the Appellate Court, after full discussion of the issues, determined that Wilson's case should not have been removed to Federal Court and therefore remanded it. By a plain reading of the statute this decision is not

reviewable. Congress has made all judgments "remanding a cause to the State Court final and conclusive." In re *Pennsylvania Co.*, 137 U.S. 451, 454, 11 S.Ct. 141, 142, 34 L.Ed. 738 (1890), *United States* v. *Rice*, 327 U.S. 742 at 751, 66 S.Ct. 835 at 839, 90 L.Ed. 982.

This Court held in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 46 L.Ed. 542 (1976), where the District Court ordered a remand because of its crowded docket, that Section 1447(d) did not bar review of remand orders "issued on grounds not authorized by Section 1447(c). In so doing, this Court "reemphasized the rule that Section 1447(c) remands are not reviewable." *Gravitt* v. *Southwestern Bell Telephone Company*, 431 U.S. 975, 97 S.Ct. 2941 (1977). This exception grafted onto the rule by *Thermtron* has no application to Wilson's case because in *Wilson* the Court of Appeals remanded the case to the State Court on ". . . jurisdictional . . ." (A-8) grounds squarely within Section 1447(c).

A. THE COURT OF APPEALS REMANDED THE CASE TO STATE COURT FOR JURISDICTIONAL REASONS AND, THEREFORE, THAT DECISION IS NOT REVIEWABLE BY APPEAL OR OTHERWISE.

Section 1447(d) of the Judicial Code, 28 U.S.C. Section 1447(d) (1976), prohibits review of all remand orders issued pursuant to Section 1447(c) *whether erroneous or not* and whether review is sought by appeal or by extraordinary writ. This has been the established rule under Section 1447(d) and its predecessor stretching back to 1887. (Emphasis added) *Thermtron Products, Inc.* v. *Hermansdorfer*, supra, 423 U.S. at 343. See e.g., In re *Pennsylvania Co.*, 137 U.S. 451, 11 S.Ct. 141, 34 L.Ed. 738 (1890); *Ex Parte Matthew Addy S.S. Co.*, 256 U.S. 417, 41 S.Ct. 508, 65 L.Ed. 1027 (1921); *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, 57 S.Ct. 22 81 L.Ed. 289 (1937); *United States* v. *Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946). Section 1447(c) provides in part:

> "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the District Court shall remand the case, and may order the payment of just costs."

Therefore, if a Court purports to remand a case on the ground that it was removed "improvidently and without jurisdiction," that order is not subject to challenge by appeal or otherwise. *Thermtron Products, Inc.*, v. *Hermansdorfer*, supra, 423 U.S. at 343; *Gravitt* v. *Southwestern Bell Telephone*, 430 U.S. 723, 52 L.Ed.2d 1 (1977); *Volvo Corp.* v. *Schwarzer*, 429 U.S. 1331, 50 L.Ed. 273, 97 S.Ct. 284 (1976).

The Court of Appeals remanded Respondent's suit to State Court on the basis that it was removed without jurisdiction. Petitioner admits, on pages 7 and 16 (A-10, 11) of its Petition for Writ of Certiorari, that the Court of Appeals reversed the District Court and remanded the case to State Court on the "basis of what they considered jurisdictional grounds." Petitioner states that the Court of Appeals has concluded that the 30 day rule of Section 1446(b), and its purposes "are jurisdictional." Petitioner's contention is that while the District Court remanded the case on jurisdictional grounds, its grounds for deciding this were erroneous.

Petitioner is asking this Court to review the reasoning behind the Appellate Court's decision that removal was without jurisdiction. However, this same argument was rejected by this Court in *Gravitt* v. *Southwestern Bell Telephone Company*, 430 U.S. 723, 52 L.Ed. 2d 1 (1977). In *Gravitt*, the Court of Appeals for the Fifth Circuit, by mandamus, ordered the District Court to vacate its remand order because the latter had "employed erroneous principles in concluding that it was without jurisdiction." Citing *Thermtron*, this Court held that when a remand has been ordered on the grounds stated in Section 1447(c), Section 1447(d) unmistakably commands that the order "remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise . . ."

Likewise, here, the order of the Seventh Circuit is not reviewable even were its finding of lack of jurisdiction based on erroneous reasoning.

Petitioner is asking this Court to review the grounds that the Court used in remanding a case under Section 1447(c) even though this Court has already stated,

> "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, *United States* v. *Rice* 327 U.S. 742 at 751, 66 S.Ct. 835 at 838, 90 L.Ed. 982, Congress immunized from all forms of appellate review *any remand order* (emphasis added) issued on the grounds specified in Section 1447(c), whether or not that order might be deemed erroneous by an appellate court. *Thermtron Products, Inc.* supra, 423 U.S. at 351.

The Court of Appeals stated on page 8 of its opinion (A-8) that the District Court's judgment is vacated "for want of federal jurisdiction." This indicates that the reason for its remand of the case back to State Court was jurisdictional. Its discussion of policy "concerns" was only an attempt to outline its reasons for determining there was no jurisdiction, which it is not even required to do. *Thermtron Products, Inc.* v. *Hermansdorfer*, supra, 423 U.S. at 357. It is at most dicta.

To allow review of the scholarly exposition which the Court used to explain jurisdiction rule 1447(c) would effectively dispense with the Section 1447(d) bar to review; it would make the Section 1447(d) bar on review contingent on the use of the "magic words" of Section 1447(c). Surely this could not be the intent of Congress when enacting this statute.

The purpose of Section 1447(d) is very clearly to prevent the additional delay which a removing party might achieve by seeking appellate reconsideration of an order of removal. *Thermtron Products, Inc.* v. *Hermansdorfer*, supra, 423 U.S. at 354. Allowing review here would under-

mine the purpose of the statute and would soon render meaningless Congress' express, and heretofore, fully effective, directive prohibiting this review and mandating quick, effective justice in State Courts.

For the reasons stated herein this Court should not grant petitioner's request for a writ of certiorari to review the Court of Appeals' order remanding this case to State Court.

B. THE COURT OF APPEALS BASED ITS REMAND ORDER ON GROUNDS THAT THE CASE WAS IMPROVIDENTLY REMOVED AND, THEREFORE, THAT DECISION IS NOT REVIEWABLE.

The Court of Appeals in *Wilson* stated on page 4 (A-4) of its opinion that the original case was removable but that Petitioner failed to remove within the 30 day statutory time period and the action did not revive because the amendments were insubstantial. Many courts have held that failure to comply with the statutory time requirement for removal is the sort of defect which makes a case "improvidently" removed.

In *London* v. *U.S. Fire Ins. Co.*, 531 F.2d 257 (C.A.Fla., 1976), the Court held that failure to comply with the statutory time requirement for removal of a case was the sort of defect which the District Court was entitled to consider and, by reason thereof, the case was "improvidently" removed. *Friedrich* v. *Whittaker Corp.*, 467 F. Supp. 1012 (D.C.Tex. 1979), held that removal is "improvident," requiring remand to State Court if the 30 day filing requirement is not complied with. *Typh. Inc.* v. *Typhoon Fence of Pennsylvania, Inc.*, D.C.Pa. (1978), 461 F.Supp. 994, held that if an action were removable at any time the Complaint was filed and defendants failed to file the removal petition within 30 day period, the Court may, solely on that ground, remand to State Court.

While the Court of Appeals did not specifically use the term "improvidently removed," it did state that it

remanded because the Defendant did not file within the 30 day time period. In re *Weaver*, 610 F.2d 335 (1980), held that even though the specific language of Section 1447(c) was not used, where the District Court Judge believed the case was not removable and concluded that removal of State Court action, if it had been proper at all, was no longer available after defendants had sought dissolution of injunction in State Court, the logical inference was that the District Court Judge felt jurisdiction was lacking; thus the Court of Appeals was precluded from reviewing the removal order. In *Weaver*, the District Court did not refer to Section 1447(c), nor did it mention the phrase "removed improvidently and without jurisdiction." It merely concluded that removal was no longer available. Such a ruling is not within the specific enumerated grounds of Section 1447(c). Citing in re *Merrimack Mutual Fire Insurance Company*, 587 F.2d 642 (5thCir., 1978) the Court stated that "following *Gravitt*, *Thermtron* was intended to be strictly limited to those cases in which a District Court has clearly not relied upon Section 1447(c) in ordering the remand.

Even though the Court of Appeals did not use the specific language of Section 1447(c) it is apparent that at the time of the remand order, the Court believed the case was not removable, thus leading to the logical inference that it felt the case was removed "improvidently and without jurisdiction." Such a holding is well within the guidelines of Section 1447(c) and therefore, that holding is not reviewable on appeal or otherwise. *Thermtron Products, Inc.* v. *Hermansdorfer* and Gravitt v. *Southwestern Bell Telephone Co.*, supra.This Court should not grant petitioner's petition for writ of certiorari, to review this holding. To allow review here would make the Section 1447(d) bar contingent on the use of the "magic words" of Section 1447(c) and this surely was not the intention of Congress.

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORDANCE WITH THE DECISIONS OF THIS COURT AND OTHER LOWER FEDERAL COURTS.

Petitioner contends that the decision of the Court of Appeals here is contrary to this Court's decision in *Thermtron*, supra. However, that is not the case. The Court of Appeals based its decision on its belief that the case had been removed without jurisdiction. Petitioner contends that this Court's decision in *Thermtron* stands for the proposition that no discretionary factors can be looked at when deciding whether to remand. However, this Court in *Gravitt*, supra, held that a decision to remand cannot be reviewed on the basis that the factors, used in deciding whether there was jurisdiction, were erroneous. The decision in *Thermtron*, is limited to the specific instance where the Court expressly states grounds for remanding that are clearly outside the realm of Section 1447(c).

Moreover, the language of the opinion seized upon by Petitioner is ". . . *If* the only interests at stake in this litigation *were* the private interests of the parties, we *might* agree . . . that the case was improperly removed." (emphasis added)

"*Might*" is not "would."

Petitioner's abysmal failure to comprehend the classic subjunctive condition-contrary-to-fact construction argues more for the inadequacy of Petitioner's Latin and English rhetorical background than for an interpretation that the Appellate Court's remarks here are more than classic *obiter dicta*, and that the usual rules of construction on appeal apply: the Court will read a decision in accordance with a valid rule which will sustain it.

The mere inclusion of the word "improvidently" harmonizes the opinion and the statute with the justice of the Court's decision.

The Court of Appeals in *Wilson* based its decision to remand on grounds expressly stated in Section 1447(c), that is, on jurisdictional grounds. This is clearly in accordance with this Court's decisions in *Thermtron* and *Gravitt*, supra.

The decision of the Court of Appeals is not contrary to any decisions of this Court or of other lower Federal Courts. Therefore, there is no reason to disturb the ruling of the Court of Appeals and to delay Respondent any longer in proceeding with the prosecution of his lawsuit.

CONCLUSION

For the reasons stated herein, a writ of certiorari should not be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals and an order for fees and costs because of the clear violation of 1447(d) in the taking of this review, under Supreme Court Rule 50(1).

Respectfully submitted,

BY: _____
ROBERT I. AULER
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Petition for Removal A-12

David C. WILSON,
Plaintiff-Appellant,

v.

INTERCOLLEGIATE (BIG TEN) CONFERENCE ATHLETIC ASSOCIATION an Unincorporated Association et al.,
Defendants-Appellees.

No. 81-2154.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 5, 1982.
Decided Jan. 26, 1982.

Robert I. Auler, Urbana, Ill., for plaintiff-appellant.

Charles L. Palmer, George V. Eighmey, Champaign, Ill., Byron L. Gregory, McDermott, Will & Emery, Chicago, Ill., for defendants-appellees.

Before BAUER, Circuit Judge, MARKEY, Chief Judge,[5] and POSNER, Circuit Judge.

POSNER, Circuit Judge.

This case, on the view we take of it, turns on the following question under 28 U.S.C. § 1446(b): if a case initially filed in state court is removable to federal court but the defendant waives his right to remove, under what circumstances will that right revive if the plaintiff subsequently amends his complaint to add new federal claims?

The plaintiff, David C. Wilson, today a quarterback for the New Orleans Saints, was in 1980 a transfer student at the University of Illinois from a junior college in California. The principal defendants are the Intercollegiate (Big Ten) Conference of Faculty Representatives, an association of ten midwestern universities, and those universities. The rules of the Conference, so far as relevant here, (1) limit a

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[5] Of the United States Court of Customs and Patent Appeals.

Big Ten student to four seasons of playing college football, and (2) declare him ineligible in any season if he has failed to accumulate a specified minimum number of course credits (the number depends on what year of college he is in). When Wilson entered the University of Illinois in February 1980, he was in his third year of college and therefore ineligible to play beyond the (fall) 1980 season; and because the University refused to give him full credit for all the courses he had taken at his junior college, he was ineligible to play even in 1980 for want of the requisite accumulated credits. He sought a waiver of both rules, but after various interim decisions unnecessary to detail here the Conference refused to waive either one.

In August 1980, shortly before the beginning of the 1980 college football season, Wilson brought this suit in an Illinois state court. His complaint alleged that the Conference's refusal to waive its rules denied him equal protection of the laws and due process of law, in violation of both the United States and Illinois Constitutions. The complaint sought injunctive relief and damages. The defendants did not attempt to remove the case to federal court. The state court, Judge Clem, issued a preliminary injunction in Wilson's favor on September 5, 1980, holding that he had established a likelihood of prevailing on the merits of his constitutional claims. Judge Clem later dissolved the preliminary injunction when the defendants presented new evidence bearing on Wilson's academic progress (or rather lack thereof), but the Illinois Appellate Court reinstated the preliminary injunction on September 19 and the Illinois Supreme Court refused to review the appellate court's action. Because of the injunction, Wilson was able to play the whole 1980 football season.

We come to the critical stage of the proceedings. In March 1981 Wilson amended his complaint by adding several additional counts (and also by quantifying for the first time the damages he was seeking). The amended complaint maintained the focus of the original complaint on the Conference's refusal to waive its rules in Wilson's

favor, but this refusal was now alleged to violate not only the equal protection and due process clauses of the U.S. and Illinois Constitutions but also several federal civil rights statutes (42 U.S.C. §§ 1981, 1983, and 1985); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (which deals with sex discrimination); the First Amendment to, and the full faith and credit clause of the U.S. Constitution; and the Illinois Antitrust Act, Ill. Rev.Stat., ch.38 § 60-3. The defendants promptly filed a new petition to remove the case to federal district court. After denying Wilson's motion to remand the case to the state court, the district court granted summary judgment for the defendants on all counts and dismissed the complaint. Wilson appeals both from the order denying his motion to remand the case to state court and from the dismissal of the complaint.

If the only interests at stake in this litigation were the private interests of the parties, we might agree with the district judge that the case was properly removed to federal court. The original complaint was removable, notwithstanding the presence of a state claim in the complaint. The state claim was so closely related to the federal claim that if Wilson had brought the case in federal court the court would have had pendent jurisdiction over the state claim. Therefore the entire complaint was within the original jurisdiction of the federal courts and hence removable under 28 U.S.C. § 1441(a). See, e.g., *Hazel Bishop, Inc.* v. *Perfemme, Inc.*, 314 F.2d 399, 402-03 (2d Cir. 1963).

The defendants chose not to remove. They must have regretted this decision as they saw the case progress through the state-court system favorably to Wilson. Then Wilson (or rather his attorney) made what must have seemed to the defendants a colossal tactical blunder: amending the complaint to add a scattershot of new federal claims that no doubt struct the defendants (as they struck the district court) as insubstantal, and thereby reviving their right to remove and giving them a chance to

escape from what had turned out to be an unfavorable state forum. Wilson was hoist with his own petard—and there we would leave him were it not for the presence in this case of policy concerns, jurisdictional in nature and hence not waivable, relating to the power of the federal courts to divest state courts of jurisdiction over cases properly submitted to them.

Section 1446(b) of the Judicial Code provides that if a case filed in a state court, though removable to federal court, is not removed by petition filed within 30 days of the receipt of the complaint, it is not removable thereafter. The courts, however, have read into the statute an exception for the case where the plaintiff files an amended complaint that so changes the nature of his actions to constitute "substantially a new suit begun that day." *Fletcher* v. *Hamlet*, 116 U.S. 408, 410, 6 S.Ct. 426, 29 L.Ed. 679 (1886); see 14 Wright, Mill. & Cooper, Federal Practice and Procedure § 3732, at 727-29 (1976), and cases cited therein. It is idle to pretend that the *Fletcher* test or any of the alternative formulations that the courts sometimes use (e.g., "an entirely new and different suit," *Cliett* v. *Scott*, 233 F.2d 269, 271 (5th Cir. 1956)) are self-defining. The right to revive must be determined in each case with reference to its purposes and those of the 30-day limitation on removal to which it is an exception, and against a background of general considerations relating to the proper allocation of decision-making responsibilities between state and federal courts.

The purpose of the 30-day limitation is twofold: to deprive the defendant of the undeserved tactical advantage that he would have if he could wait and see how he was faring in state court before deciding whether to remove the case to another court system; and to prevent the delay and waste of resources involved in starting a case over in a second court after significant proceedings, extending over months or even years, may have taken place in the first court. These considerations might be overborne in a case where a plaintiff, seeking to mislead the defendant about

the true nature of his suit and thereby dissuade him from removing it, included in his initial complaint filed in state court an inconsequential but removable federal count unlikely to induce removal and then, after the time for removal had passed without action by the defendant, amended the complaint to add the true and weighty federal grounds that he had been holding back. Cf. *Powers* v. *Chesapeake & O. Ry.*, U.S. 92, 99, 18 S.Ct. 264, 266, 42 L.Ed. 63 (1898); *Miles* v. *Stark*, 440 F.Supp. 947 (N.D.Tex. 1977). But this case presents the opposite pattern. Wilson tendered his fundamental federal claim, that defendants had violated his equal protection and due process rights under the U. S. Constitution, at the very outset. His amended complaint added only purely procedural count which clearly did not alter the character of the suit (the count based on 42 U.S.C. § 1983, which is the vehicle for redressing substantive violations of the Constitution, including equal protection and due process violations) and a number of other federal counts, all apparently make-weights and some never pressed at all. It seems inconceivable to us (and defendants do not argue) that Wilson's lawyer adopted this pleading sequence in order to discourage the defendants from exercising their right to removal, or that it could have had that effect.

But it would be too narrow a construction of the right of revival to limit it to cases where the plaintiff deliberately holds back his strong federal cards hoping to induce the defendant to waive his right to remove the original complaint. Amendments might fundamentally alter a complaint not because the plaintiff had been trying to mislead the defendant but because new facts had come to light in the course of pretrial discovery. In such a case—where the amended complaint in effect begins a new case—using the 30-day limitation in section 1446(b) to bar removal would not serve the purposes of the limitation in any significant way. The defendant's tactical advantge would be small because whatever favor or disfavor the state court had shown to his defense of the original complaint need not

carry over to an amended complaint which by hypothesis kicks off an essentially new lawsuit. And judical economy would not be promoted by forbidding removal because, again by hypothesis, the defendant is seeking not to start an old case over in a new court but to litigate a new case in the new court.

The amendments in the present case did not change the original complaint so drastically that the purposes of the 30-day limitation would not be served by enforcing it. The amendments did not change the target of Wilson's attack or the nature of the relief sought. He still wanted the rules limiting his eligibility changed or waived and he still sought injucitive and monetary relief for the Conference's refusal to do so. The basic legal theory of his action—that the Conference rules, as applied to him, were unfair and discriminatory and that he had not been given a fair hearing in his efforts to obtain a waiver of them—was unchanged. There was thus no "abandonment of the original for a new cause of action," as in *Henderson v. Midwest Refining Co.*, 43 F.2d 23, 25 (10th Cir. 1930), or as in *Craig Food Indus. v. Taco Time Int'l, Inc.*, 469 F.Supp. 516, 521 (D. Utah 1979), where the amended complaint changed a diversity case into a federal-question case. The amendments here merely added constitutional and statutory references purporting to further show that the treatment of which Wilson complained was unlawful. That an additional state claim, based on the Illinois Anti-trust Act, was also added to the complaint is not a ground for removal to federal court.

In fact this case illustrates very nicely the purposes behind the 30-day limitation. Removal to federal court long after the original complaint had been filed and substantial proceedings—unfavorable to the defendants—had taken place in the state courts interrupted an active litigation, thus reducing judicial economy, and delivered a sustantial and unearned tactical advantage into the hands of the defendants. It is more likely that the defendants removed the case because they were doing badly in the

state courts than because they felt that the amended complaint confronted them with a different case from the one they had been fighting in those courts. Nor, as we said before, is there any basis for supposing that the original complaint was designed to lull the defendants into waiving their right to remove by concealing from them the true nature and dimentions of the plaintiff's federal case.

We do not wish to be understood as proposing new formulas for deciding when the right to remove revives after the 30-day deadline has passed. The issue does not lend itself to decision by verbal talismans. The intelligent decision of particular cases requires instead a sensitivity to the purposes of both the 30-day limitation and its judicially engrafted exception. Another kind of sensitivity is also required of federal courts in dealing with this problem: sensitivity to the danger of encroaching unduly on the authority of the state courts. This case illustrates that danger. A state constitutional issue that began by being litigated in the state-court system, favorably to the claimant be it noted, ended up by being decided unfavorably to the claimant by a federal district judge. It is true that even if the case had been properly removed to federal court, the court could have declined to exercise its pendent jurisdiction and remanded the state claims. And a concern with the value of federalism involves a touch of irony in this case given the nature of the particular state claims: Judge Clem, in construing the equal protection and due process clauses of the Illinois Constitution, relied entirely on cases construing the counterpart clauses of the Fourteenth Amendment to the U. S. Constitution; and the Illinois Antitrust Act incorporates by reference, to the extent applicable, decisional law under the federal antitrust statutes. Ill.Rev.Stat., ch. 38, § 60-11. But although the interest of the state courts in adjudicating the particular state-law claims in this case may be somewhat attenuated, this feature of the case is idiosyncratic. It does not convert the state claims into federal claims (see Currie, Federal Jurisdiction 108-10 (2d ed. 1981)) and it does not weaken our conviction that the district courts, in inter-

preting and applying section 1446(b), should bear in mind, and where possible avoid, the frictions in a harmonious federal system that result when litigation involving state-law as well as federal-law issues is abruptly shifted into federal court and the state proceedings, including here a preliminary adjudication on the merits, are set at naught.

The order of the district court, 513 F.Supp. 1062, denying the motion to remand is therefore reversed and the case remanded to that court for entry of an appropriate order remanding the case to the state court. The district court's judgment dismissing the complaint on the merits is vacated for want of federal jurisdiction.

So Ordered.

STATUTES CONSTRUED

28 U.S.C. § 1446(b) (1976): Procedure for Removal

> (b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

28U.S.C. § 1447(c) (1976): Procedure After Removal Generally

> (c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(d)

> (d) An order remanding a case to the State court is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this chapter shall be reviewable by appeal or otherwise.

REASONS FOR GRANTING THE PETITION

I. IN DETERMINING WHETHER REMOVAL JURISDICTION EXISTED, THE COURT OF APPEALS TOOK INTO ACCOUNT DISCRETIONARY FACTORS DIRECTLY CONTRARY TO THE DECISIONS OF THIS COURT AND OF LOWER FEDERAL COURTS.

Section 1447(c) of the Judicial Code, 28 U.S.C. § 1447(c) (1976), provides that a removed case may be remanded to state court only if the district court determined that it was removed "improvidently and without jurisdiction." The district court to which this action was removed rejected the plaintiff's motion to remand, finding that the requisites of 28 U.S.C. §§ 1441 and 1446 (1976) had been met.[2] The Court of Appeals reversed that order on the basis that the district court had failed to assess certain "policy concerns, jurisdictional in nature and hence not waivable" by the plaintiff, despite the fact that these concerns were discretionary, not jurisdictional, and had never been raised by either party, by the district court, or by any other federal court in a removal case.

The Court of Appeals conditioned removal jurisdiction upon whether (1) its perceived purposes for the 30-day rule in 28 U.S.C. § 1446(b)((a) to promote judicial economy, and (b) to deprive a defendant of an "unearned" advantage) would no longer be served; (2) the new federal claims were more "weighty" than those originally advanced; (3) the original claim was abandoned; (4) plaintiff either intentionally

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[2]Without explanation, the Court of Appeals never addressed the district court's decision that removal was proper pursuant to 28 U.S.C. § 1441(c) (1976). Instead, it dealt only with whether removal jurisdiction existed under 28 U.S.C. § 1446(b) (1976). The Conference had advanced both grounds both in the district court and the Court of Appeals. Moreover, the tests which each of the two sections presents are dissimilar so that resolution that removal jurisdiction did not exist under one section would not preclude removal jurisdiction being found to exist under the other.

The revival doctrine, like paragraph 2 of 28 U.S.C. § 1446(b) (1976), which provides that an amendment to a complaint can render a case removable that was not removable originally, is an important exception to the 30-day rule. As an exception, it need not satisfy the purposes of that rule. The policy concerns which the Court of Appeals read into the 30-day rule are not relevant to determining the existence of removal jurisdiction.

Moreover, the 30-day rule is but a small and non-jurisdictional part of general removal statutes. 1A *Moore's Federal Practice*, paragraph 0.168(3.-5) at 490-91; *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 98 (1898); *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U.S. 339 (1913); *Meyers-Arnold Co.* v. *Maryland Casualty Co.*, 248 F. Supp. 140, 146 (D.S.C. 1965). It may be waived by plaintiff withough regard to whether the 30-day rule's purposes have further value. *See Haun* v. *Retail Credit Co.*, 420 F. Supp. 859, 863 (W.D.Pa. 1976). The Court of Appeals has concluded that the 30-day rule, and its purposes, are jurisdictional. However, as the Court stated in *Powers:*

> "But the time of filing a petition for removal is not essential to the jurisdiction; the providion on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel." 169 U.S. at 98 (citations omitted).

Satisfaction of the purposes of the 30-day rule is immaterial to federal removal jurisdiction.

C. The Parties' Motives Are Not Relevant to a Determination of Whether Removal Jurisdiction Exists.

The Court of Appeals' analysis as to whether removal jurisdiction exists is also infirm because it takes into account defendant's motives (whether a defendant originally waited to see how he would fare in state court) and plaintiff's motives (whether he intended to withhold his weighty claims or learned of them in discovery after the 30-day

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

DAVID WILSON,

Plaintiff,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Defendants.

PETITION FOR REMOVAL

Defendants Intercollegiate Conference of Faculty Representatives, an unincorporated association ("Big Ten Conference"); and the following universities as member institutions of the Big Ten Conference: Indiana University, Purdue University, University of Michigan, Michigan State University, University of Iowa, University of Wisconsin, Ohio State University, University of Minnesota, and Northwestern University,* by their attorneys, hereby petition for removal of the above-entitled action from the Circuit Court of the Sixth Judicial District, Champaign County, Illinois, to the United States District Court for the Central District of Illinois, Danville Division, and in support state:

In its original form, the complaint was removable but for the fact that the University of Illinois, Neale Stoner and the University of Illinois Athletic Association did not consent to any removal. In the morning of September 2, 1980, the Big Ten Conference moved to realign the remaining defendants since they had aligned themselves entirely with plaintiff's case in the preliminary injunction hearing. The court granted the Big Ten Conference's motion to realign the parties that morning so that the University of Illinois, Neale Stoner and the University of Illinois Athletic Association were formally deemed plaintiffs.